247 N.C. App.—No. 2 Pages 249-400

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 6, 2018

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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Clerk
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Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
David Alan Lagos

Staff Attorneys
John L. Kelly
Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
Michael W. Rodgers
Lauren M. Tierney
Justice D. Warren

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

COURT OF APPEALS

CASES REPORTED

FILED 3 MAY 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Public Officers and Employees—discharge—political discrimination—prima facie showing—working for public agency in non-policymaking position—In an action by a discharged State employee who alleged political discrimination, the employee met the first element of the required prima facie case by showing that he had worked for a public agency in a non-policymaking position at the time of his termination. He had been the Alcohol Law Enforcement (ALE) Director (a policymaking position) before requesting a return to the field as an ALE Special Agent ahead of the governor's office changing to a new party. He was discharged as a Special Agent. **N.C. Dep't of Pub. Safety v. Ledford, 266.**

Public Officers and Employees—discharge—political discrimination—public policy—The State's argument that it would be bad policy to uphold an administrative law judge's decision that a state employee was discharged for political reasons because it would entrench partisan political employees was declined. **N.C. Dep't of Pub. Safety v. Ledford, 266.**

SEARCH AND SEIZURE

Search and Seizure—prolonged traffic stop—motion to suppress evidence—reasonable suspicion—nervous behavior—associated with known drug dealer—The trial court erred in a possession of a schedule II controlled substance case by denying defendant's motion to suppress evidence uncovered after she gave consent to search her car. The findings that defendant was engaging in nervous behavior and that she had associated with a known drug dealer were insufficient to support the conclusion that the officer had reasonable suspicion to prolong defendant's detention once the purpose of the stop had concluded. **State v. Bedient, 314.**

Search and Seizure—traffic stop—consent to search—voluntary—Defendant's consent to search his car following a traffic stop was voluntary and the trial court erred by suppressing evidence of cocaine and heroin. Although it appeared that the trial court believed that the officer lacked reasonable suspicion to extend the stop, and that the unlawful extension impinged on defendant's ability to consent, the trial court misunderstood the sequence of events. **State v. Castillo, 327.**

Search and Seizure—traffic stop—extended—reasonable suspicion—The trial court erred by suppressing evidence of cocaine and heroin that resulted from a traffic stop where the officer had reasonable suspicion to extend the stop based on defendant's bizarre travel plans, his extreme nervousness, the use of masking odors, the smell of marijuana on his person, and the third-party registration of the vehicle. **State v. Castillo, 327.**

SENTENCING

Sentencing—life without parole—sufficiency of findings of fact—mitigating factors—The trial court abused its discretion in a first-degree murder case by resentencing defendant to life without parole under N.C.G.S. § 15A-1340.19A *et seq.* The trial court did not issue sufficient findings of fact on the absence or presence of mitigate factors. The case was reversed and remanded to the trial court for further sentencing proceedings. **State v. James, 350.**

Sentencing—mitigating factors—sufficiency of findings of fact—The trial court erred in a first-degree murder case by failing to make adequate findings of fact to support its decision to impose a sentence of life without parole. Nowhere in the

order did the resentencing court indicate which evidence demonstrated the absence or presence of any mitigating factors. **State v. James, 350.**

Sentencing—statutory sentencing provision—aggravated sentencing—no notice—finding by trial court—constitutionality—On appeal from defendant's trial for multiple sexual offenses committed against a child, in which he received an aggravated sentence pursuant to N.C.G.S. § 14-27.4A(c), the Court of Appeals held that N.C.G.S. § 14-27.4A(c) (subsequently codified at N.C.G.S. § 14-27.28(c)) was facially unconstitutional. Pursuant to that sentencing provision, defendant was given no advance notice of the State's intent to seek any aggravating factors, and the "egregious aggravation" factors were found solely by the trial court rather than by the jury beyond a reasonable doubt. Because the error was not harmless, the case was remanded for a new sentencing hearing. **State v. Singletary, 368.**

TERMINATION OF PARENTAL RIGHTS

Termination of Parental Rights—abandonment of child—finding—not sufficient—The trial court erred in concluding that respondent had willfully abandoned his child under N.C.G.S. § 7B-1111(a)(7). The findings did not demonstrate that respondent had a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims" to the child. Abandonment was the sole ground for termination found by the trial court and the order was reversed. **In re S.Z.H., 254.**

Termination of Parental Rights—entry of order—not timely—It was noted in a termination of parental rights case that the trial court violated N.C.G.S. § 7B-1109(e) and N.C.G.S. § 7B-1110(a) by entering its termination order roughly six months after the adjudicatory and dispositional hearing. **In re S.Z.H., 254.**

Termination of Parental Rights—not maintaining communications with child—evidence—not sufficient—A trial court's finding in a termination of parental rights case that respondent did not maintain communications with his child was not supported by clear, cogent, and convincing evidence. Moreover, the trial court conflated the separate stages of adjudication and disposition; it is imperative that the two inquiries be conducted separately, although they may be conducted in the same hearing. **In re S.Z.H., 254.**

WITNESSES

Witnesses—interested—jury instructions—In defendant's trial for multiple sexual offenses committed against a child, the trial court did not err by declining to give defendant's requested pattern jury instruction on the testimony of an interested witness. The trial court's jury instruction was sufficient to address defendant's concern, leaving no doubt that it was the jury's duty to determine whether the witness was interested or biased. **State v. Singletary, 368.**

Witnesses—State's expert—compensation—cross-examination—In defendant's trial for multiple sexual offenses committed against a child, the trial court erred by not allowing defendant to inquire into an expert witness's compensation during cross-examination. The error, however, was not prejudicial, because testimony regarding the source of the witness's compensation was heard by the jury, the payments were disclosed in defendant's criminal file, and there was overwhelming evidence of defendant's guilt. **State v. Singletary, 368.**

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

ALLAN ROBERT CAMPBELL, PLAINTIFF
v.
GARDA USA, INC. AND NEW HAMPSHIRE INSURANCE COMPANY, DEFENDANTS

No. COA15-756

Filed 3 May 2016

Workers' Compensation—attorney fees—grounds for award—partially improper

A workers' compensation award of attorney fees was vacated and remanded where there were grounds for imposing attorney fees for a discovery violation, but the Industrial Commission relied in part on two erroneous grounds.

Appeal by defendants from opinion and award entered 19 March 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 December 2015.

Charles G. Monnett, III & Associates, by Lauren O. Newton, for employee plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, LLP, by M. Duane Jones, Jeffrey A. Kadis, and Brooke A. Mullenex, for employer and carrier defendant-appellants.

DIETZ, Judge.

Plaintiff Allan Campbell suffered two workplace injuries while employed by Defendant Garda USA: one in December 2011 and one in July 2012. He reported both injuries to his employer immediately after they occurred. Campbell did not miss any work, but his injuries required medical treatment.

In August 2012, Campbell filed separate workers' compensation claims for his two workplace injuries. In November 2012, Garda agreed to pay medical benefits for the December 2011 injury, while reserving its right to later contest compensability. Garda denied the claim for the July 2012 injury.

During discovery, Garda falsely stated that it did not possess any written documents concerning the 2012 injury. In a later deposition, a Garda employee conceded that a written document existed and indicated that he had a copy on his computer, which he had with him at

the deposition. Garda's lawyers then told the employee to stop talking and to power down his computer. Even after the deposition, Garda still refused to produce the document and, ultimately, a deputy industrial commissioner had to order its production. In its final opinion and award, the Industrial Commission imposed attorneys' fees on Garda under N.C. Gen. Stat. § 97–88.1 for "unfounded litigiousness."

On appeal, Garda contends that some of the grounds on which the Commission relied to award attorneys' fees are erroneous. As explained below, we agree with Garda that some of the Commission's reasoning, such as faulting Garda for asserting an unfounded notice defense that Garda never actually asserted, would not support attorneys' fees. But Garda's discovery violation readily provides a legal basis for attorneys' fees under N.C. Gen. Stat. § 97–88.1. Accordingly, we hold that attorneys' fees under § 97–88.1 are permitted in this case but, because some of the Commission's reasoning is erroneous, remand for the Industrial Commission to reassess its attorneys' fees award in light of the unfounded litigiousness described in this opinion.

Facts and Procedural History

On 1 December 2011, Allan Campbell sprained his left ankle while working for Garda USA, Inc. Campbell immediately informed his manager of the incident. He received medical treatment for the sprain, including physical therapy and various forms of pain medication. Campbell did not miss any work as a result of his injury.

On 19 July 2012, Campbell again injured himself when he slipped and fell while trying to lift a wooden pallet at work. After his fall, Campbell sent an email to his branch manager to notify him of the incident. The email had the subject line "keep this on file" and stated as follows:

> I lifted a pallet and slipped on oil in the bay. Tweaked my lower back. I will take it easy today but at this time do not wish to seek medical. That's all I need right now is to file a claim with all of the stuff going on. We need to get oil dry today.

No one witnessed Campbell's fall, and he did not seek immediate medical treatment.

On 27 July 2012, Garda terminated Campbell's employment due to poor job performance. Later that day, at a scheduled appointment with his doctor concerning his high blood pressure, Campbell informed his doctor that he had severe back pain and explained that the pain originated with his fall earlier in the month.

On 6 August 2012, Campbell filed a claim against Garda for his December ankle injury. Two days later, Campbell filed another claim, this time addressing his July back injury.

On 8 November 2012, Garda agreed to pay Campbell's medical expenses without prejudice to later denying the compensability of the claim using Form 63. Garda denied the compensability of Campbell's back injury using Form 61. The two claims were later consolidated for hearing before a deputy industrial commissioner.

During discovery, Campbell requested that Garda identify any statements obtained from Garda employees concerning Campbell's back injury and to turn over any documents concerning that injury. Garda initially responded to these requests with a blanket objection based on attorney-client privilege. After further discussion between counsel for the parties, Garda amended its discovery responses and stated that it was "not in possession of any written statement, photograph, writing or document related to the incident [on 19 July 2012]."

Six months later, Campbell deposed Bart Gibbons, a Garda risk management analyst, via telephone. During Gibbons's deposition testimony, he acknowledged that the company that manages Garda's workers' compensation claims had made an entry concerning Campbell's 19 July 2012 back injury in records accessible to Garda. That entry, called a "first report of injury," is part of a generated report described by Gibbons as "an internal document that comes from [a] third-party administer [sic]."

Gibbons had a copy of that document on his computer, which he had with him as he was testifying. When Campbell's counsel asked Gibbons to provide her with a copy of that document, counsel for Garda instructed Gibbons not to comply with that request and further instructed him to power down his computer and "not testify to anything that you are looking at on your computer." Gibbons obeyed, and Campbell's counsel expressed her intention to seek a ruling from the deputy industrial commissioner compelling Garda to produce the document. She then instructed the court reporter to hold Gibbons's deposition open pending a determination from the Industrial Commission.

After further motions practice, the deputy industrial commissioner ordered Garda to produce the document. The following day, Garda produced the document to Campbell. It contained an entry dated 27 July 2012 indicating that Campbell "slipped on an oil spill" and "sustained unknown injuries to back." As the Full Commission later found, this evidence, which was plainly responsive to Campbell's discovery request,

"was not produced voluntarily and . . . [Garda] had to be compelled by the Commission to produce [it]."

On 23 May 2014, the deputy commissioner filed an opinion and award ordering Garda to pay certain medical expenses incurred, or to be incurred, from Campbell's injuries, and ordering Garda to pay Campbell's attorneys' fees in the amount of $13,212.50. On 5 June 2014, Garda appealed to the Full Commission. The Full Commission affirmed and Garda timely appealed its award of attorneys' fees to this Court.

Analysis

The North Carolina Workers' Compensation Act grants the Industrial Commission the authority to impose attorneys' fees on either party if it determines that "any hearing has been brought, prosecuted, or defended without reasonable ground." N.C. Gen. Stat. § 97–88.1. Our precedent requires us to review an award under § 97–88.1 using a two-part test. First, this Court reviews *de novo* the legal question of whether a claim was "brought, prosecuted, or defended without reasonable ground." *Ensley v. FMC Corp.*, 222 N.C. App. 386, 390, 731 S.E.2d 855, 858 (2012). If our *de novo* review reveals that there were legal grounds to impose fees, we then review the Industrial Commission's determination of "whether to make an award and the amount of the award" for abuse of discretion. *Id.*

We have no hesitation in concluding that Garda's conduct satisfies the statutory criteria for imposing attorneys' fees under the first prong of our two-part review. The record indicates that Garda falsely stated in discovery responses that it did not have any information concerning Campbell's July 2012 back injury when, in fact, it had information, and had access to a document, relevant to issues of compensability. Moreover, after a Garda employee's deposition revealed the existence of the responsive document (which Garda previously denied even existed), Garda did not immediately produce it. Ultimately, upon Campbell's motion, a deputy industrial commissioner had to order its production. As a matter of law, this type of discovery violation satisfies the statutory criteria of N.C. Gen. Stat. § 97–88.1 and permits the Industrial Commission, in its discretion, to impose attorneys' fees. *See Hauser v. Advanced Plastiform, Inc.*, 133 N.C. App. 378, 385–89, 514 S.E.2d 545, 550–53 (1999).

Garda does not dispute the underlying facts surrounding its discovery violation, but argues that the Industrial Commission also relied on two improper grounds in awarding attorneys' fees: first, that Garda failed to contest the claim within 90 days in violation of N.C. Gen. Stat.

§ 97–18(d) and, second, that Garda asserted an unfounded notice defense. Garda argues that both of these grounds are erroneous because N.C. Gen. Stat. § 97–18(d) does not apply to medical benefits-only claims and Garda never asserted a notice defense.

We agree with Garda that the Industrial Commission relied on these two grounds in awarding fees under § 97–88.1, as the Commission's order indicates:

> Although defendants accepted plaintiff's foot injury as medical only via a Form 63, *they never "contest[ed] the compensability of the claim or its liability therefore [sic] within 90 days from the date [they] first ha[d] written or actual notice of the injury" in accordance with N.C. Gen. Stat. § 97–18(d)*. As a result of the denial of medical treatment for Plaintiff's foot, Plaintiff was denied medical treatment for his injury for over a year. Furthermore, *defendants denied plaintiff's back injury on the basis that they had no notice of said injury* despite overwhelming evidence to the contrary that was not produced voluntarily and which they had to be compelled by the Commission to produce. The behavior of the defendant-employer in this claim has been unfoundedly litigious and defendant-employer is therefore subject to sanctions pursuant to N.C. Gen. Stat. § 97–88.1.

We also agree with Garda that neither of these two grounds would support an award of attorneys' fees under § 97–88.1. First, Form 63—the document issued by the Industrial Commission for use in paying medical benefits without prejudice to later challenging compensability—indicates that N.C. Gen. Stat. § 97–18(d) and its corresponding 90-day response requirement do not apply to a medical benefits-only claim like Campbell's. Thus, even if that statute and its 90-day provision apply here, Garda's failure to comply with that statutory requirement, standing alone, was not unreasonable. We cannot fault Garda for relying on the instructions in a government-issued form.[1]

Likewise, Garda did not assert a notice defense in this case. The Commission cannot award attorneys' fees for asserting an unfounded defense that Garda never actually asserted.

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1. Whether N.C. Gen. Stat. § 97–18(d) actually applies to a medical benefits-only claim is not an issue before this Court. The only issue we address is whether, for purposes of awarding attorneys' fees under § 97–88.1, it was reasonable for Garda to rely on the instructions in Form 63.

In short, although there are grounds to impose attorneys' fees under § 97–88.1 in this case, the Commission at least partially relied on two erroneous grounds in its analysis. Ordinarily, when a lower court's decision is based in part on proper grounds but in part on an error of law, "it is appropriate to remand for reconsideration in light of the correct law." *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 204, 696 S.E.2d 559, 567 (2010); *see also Blitz v. Agean, Inc.*, 197 N.C. App. 296, 312, 677 S.E.2d 1, 11 (2009). Accordingly, we vacate and remand this matter for the Commission to reassess its attorneys' fees award in light of this opinion.

Conclusion

The portion of the Industrial Commission's opinion and award concerning attorneys' fees under § 97–88.1 is vacated and remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED IN PART.

Judges STROUD and TYSON concur.

IN THE MATTER OF S.Z.H.

No. COA15-1270

Filed 3 May 2016

1. Appeal and Error—notice of appeal—untimely—treated as petition for certiorari

An appeal was treated as a petition for certiorari where the notice of appeal was untimely.

2. Termination of Parental Rights—not maintaining communications with child—evidence—not sufficient

A trial court's finding in a termination of parental rights case that respondent did not maintain communications with his child was not supported by clear, cogent, and convincing evidence. Moreover, the trial court conflated the separate stages of adjudication and disposition; it is imperative that the two inquiries be conducted separately, although they may be conducted in the same hearing.

3. Termination of Parental Rights—abandonment of child—finding—not sufficient

The trial court erred in concluding that respondent had willfully abandoned his child under N.C.G.S. § 7B-1111(a)(7). The findings did not demonstrate that respondent had a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims" to the child. Abandonment was the sole ground for termination found by the trial court and the order was reversed.

4. Appeal and Error—issue not addressed—foreclosed elsewhere in opinion

An argument in a termination of parental rights case concerning the lack of appropriate findings was not addressed where it had already been determined that the trial court erred by concluding that there were grounds to terminate respondent's rights.

5. Termination of Parental Rights—entry of order—not timely

It was noted in a termination of parental rights case that the trial court violated N.C.G.S. § 7B-1109(e) and N.C.G.S. § 7B-1110(a) by entering its termination order roughly six months after the adjudicatory and dispositional hearing.

Appeal by respondent-father from order entered on 23 July 2015 by Judge Jayrene R. Maness in District Court, Randolph County. Heard in the Court of Appeals on 12 April 2016.

Mark L. Hayes, *for respondent-appellant.*

No brief filed for petitioner-appellee.

STROUD, Judge.

Respondent-father appeals from an order terminating his parental rights to S.Z.H. ("Sally").[1] Respondent argues that the trial court erred in (1) concluding that he had willfully abandoned Sally under N.C. Gen. Stat. § 7B-1111(a)(7) (2015); and (2) concluding that terminating his parental rights was in Sally's best interests without making the requisite written findings of fact. We reverse the order because the evidence was insufficient to support the challenged findings of fact and because

1. We use this pseudonym to protect the juvenile's identity.

the remaining findings of fact cannot support a conclusion of law that respondent abandoned the minor child during the relevant time period.

I. Background

This case arises from a private termination of parental rights action filed by the child's mother against the child's legal and biological father. There were no allegations of neglect, abuse, or dependency under N.C. Gen. Stat. § 7B-1111 and no involvement by any Department of Social Services. On 1 February 2008, Sally was born to petitioner-mother and respondent-father, who were unmarried and living apart in North Carolina. For approximately one to two months, respondent helped care for Sally by watching her during the day while petitioner worked. After respondent's assistance became unreliable, petitioner made other child-care arrangements for Sally during the day. Later in 2008, after petitioner was involved in a car accident and lost access to reliable transportation, petitioner and Sally moved to Virginia to live with petitioner's uncle. In 2009, petitioner and Sally moved to Arizona to help care for petitioner's mother, who had been diagnosed with cancer.

In approximately March 2013, petitioner and Sally moved back to North Carolina, and petitioner arranged for respondent to visit with Sally for roughly two hours. In April 2013, respondent tried to send a $50.00 money order to petitioner. Respondent called Sally during the next several months. In January 2014, respondent asked petitioner if he could attend Sally's birthday party in February 2014, but petitioner responded that Sally's birthday party was "probably not the best place for [respondent] to see [Sally] after not seeing her" since March 2013. Respondent and Sally have not communicated since January 2014. Sometime while petitioner and Sally were in North Carolina, petitioner married a man.[2]

On 12 May 2014, petitioner filed a petition for termination of respondent's parental rights alleging that "for more than three (3) years the Respondent has not initiated contact with the minor child[.]"[3] In approximately June 2014, petitioner, her husband, and Sally moved to Arizona. On 26 January 2015, the trial court held a hearing on the adjudication and disposition stages. At the conclusion of the hearing, Sally's guardian *ad litem* recommended that the trial court not terminate respondent's

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2. The record does not indicate the date of their marriage or the husband's name. He was identified in the transcript of testimony only as "Garry (indiscernible) Junior" or "Junior."

3. The trial court correctly concluded that North Carolina was Sally's home state at the time petitioner commenced this action. *See* N.C. Gen. Stat. § 50A-201(a)(1) (2013).

parental rights because petitioner and respondent's dispute "essentially boils down to a communication problem." On 23 July 2015, the trial court entered an order concluding that respondent had willfully abandoned Sally under N.C. Gen. Stat. § 7B-1111(a)(7) and that it was in Sally's best interests to terminate respondent's parental rights. On 25 August 2015, respondent gave untimely notice of appeal.

II. Appellate Jurisdiction

[1] We first address whether we have jurisdiction over this appeal:

> In civil actions, the notice of appeal must be filed "within thirty days after entry of the judgment if the party has been served with a copy of the judgment within the three day period" following entry of the judgment. N.C.R. App. P. 3(c)(1) (2013); N.C. Gen. Stat. § 1A-1, Rule 58 (2013). The three day period excludes weekends and court holidays. N.C. Gen. Stat. § 1A-1, Rule 6(a) (2013). . . . Failure to file a timely notice of appeal is a jurisdictional flaw which requires dismissal.

Magazian v. Creagh, ___ N.C. App. ___, ___, 759 S.E.2d 130, 131 (2014). "[I]n the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of [North Carolina Rule of Appellate Procedure] 2." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). But "[North Carolina Rule of Appellate Procedure] 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner." *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997); *see also* N.C.R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]").

Here, the trial court filed and entered the termination order on Thursday, 23 July 2015. Petitioner served respondent a copy of the order on Tuesday, 28 July 2015. Thus, respondent was served a copy of the termination order within the three-day period, since we exclude the intervening Saturday and Sunday from the three-day period. *See Magazian*, ___ N.C. App. at ___, 759 S.E.2d at 131; N.C. Gen. Stat. § 1A-1, Rule 6(a), Rule 58 (2015). Accordingly, the last day on which respondent could have filed a timely notice of appeal was Monday, August 24, 2015. *See Magazian*, ___ N.C. App. at ___, 759 S.E.2d at 131; N.C.R. App. P. 3.1(a);

N.C. Gen. Stat. §§ 1A-1, Rule 6(a), Rule 58, 7B-1001(b) (2015). Because respondent did not file a notice of appeal until Tuesday, August 25, 2015, respondent's notice of appeal was untimely. Accordingly, we treat respondent's appeal as a petition for writ of certiorari and issue a writ of certiorari to review the merits of respondent's appeal. *See Anderson*, 345 N.C. at 482, 480 S.E.2d at 663; N.C.R. App. P. 21(a)(1).

III. Termination Order

Respondent argues that the trial court erred in (1) concluding that he had abandoned Sally under N.C. Gen. Stat. § 7B-1111(a)(7); and (2) concluding that terminating his parental rights was in Sally's best interests without making the requisite written findings of fact.

A. Standard of Review

> Termination of parental rights proceedings are conducted in two stages: adjudication and disposition. In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B-1111(a). This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary. However, the trial court's conclusions of law are fully reviewable *de novo* by the appellate court.
>
> If the trial court determines that at least one ground for termination exists, it then proceeds to the disposition stage where it must determine whether terminating the rights of the parent is in the best interest of the child, in accordance with N.C. Gen. Stat. § 7B-1110(a). The trial court's determination of the child's best interests is reviewed only for an abuse of discretion. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

In re A.B., ___ N.C. App. ___, ___, 768 S.E.2d 573, 575-76 (2015) (citations, quotation marks, and brackets omitted).

B. Adjudication

i. Findings of Fact

[2] We preliminarily note that in the termination order, the trial court conflated the separate stages of adjudication and disposition, which is most clearly seen in its conclusion of law that "[i]t is in the best interests of the minor child that the parental rights of the respondent-father . . . be terminated and statutory grounds exist which justify this termination of the respondent's parental rights." A court's decision to terminate parental rights based solely on the child's best interests violates a parent's constitutional right to custody of his child. *See Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) ("The Due Process Clause ensures that the government cannot unconstitutionally infringe upon a parent's paramount right to custody solely to obtain a better result for the child."). It is imperative that courts conduct these two inquiries separately although they may be conducted in the same hearing. *See In re Parker*, 90 N.C. App. 423, 430, 368 S.E.2d 879, 884 (1988). We will thus focus our analysis on the trial court's findings of fact as to the grounds for termination of parental rights without consideration of the many findings of fact regarding petitioner's relocation to Arizona and the child's circumstances there.

[3] Respondent argues that clear, cogent, and convincing evidence does not support the trial court's Finding of Fact 15 and the underlined portion of Finding of Fact 18:[4]

> 15. Since the petitioner's return to North Carolina in early 2013, the respondent has not sought any overnight visitation with the minor child nor has he actually exercised any overnight visitation. At all relevant times, the respondent had had the ability and means to maintain communication with the minor child and to arrange or schedule such visitation.
>
> . . . .
>
> 18. The Court finds as a matter of law that statutory grounds do exist to terminate the parental rights of the respondent in that the respondent, specifically for a period of

4. Finding of Fact 18 is actually a mixed finding of fact and conclusion of law. We will address the challenged factual portion here and the remaining factual and legal portions below.

> at least six (6) months preceding the commencement of the instant action and generally since April of 2013, has willfully abandoned the minor child. Since April of 2013, the respondent has failed to provide or attempt to provide any financial support for the welfare and benefit of the minor child; he has also failed to maintain communications to show his love, care or concern for the minor child.

(Emphasis added.) Because petitioner filed the petition on 12 May 2014, we examine the six-month period from 12 November 2013 to 12 May 2014. *See* N.C. Gen. Stat. § 7B-1111(a)(7).

Respondent argues that petitioner never testified that respondent did not request to communicate or visit Sally during this period; rather, respondent argues that the evidence shows the opposite, that respondent tried to call Sally "at least every day or every other day" and asked petitioner if he could attend Sally's birthday party in February 2014.

Petitioner testified to the following events: The last time that respondent had visitation with Sally was in March 2013. Petitioner had never "active[ly] attempt[ed]" to deny respondent visitation and had not made any efforts to deny him communication with Sally. When petitioner and Sally moved back to North Carolina in April 2013, petitioner gave respondent a post office box as her mailing address but did not tell him her physical address. When petitioner changed her phone number in approximately June 2013, she provided her new number to respondent, and respondent called Sally on that number. Petitioner did not testify to how frequently respondent called Sally. When Sally returned to school in 2013, respondent called Sally and told her that he would pick her up to buy her a backpack and some shoes but did not "follow through" on these phone calls. The last time respondent called Sally was in January 2014. Respondent asked petitioner if he could attend Sally's birthday party in February 2014, but petitioner responded that Sally's birthday party was "probably not the best place for [respondent] to see [Sally] after not seeing her" since March 2013. Petitioner expressed her frustration that "[i]t's not that [respondent] doesn't want to put forth the effort, it's just [sometimes there is] no [follow-through] and for seven years [petitioner has] been following through."

Respondent testified to the following events: Since March 2013 when respondent last saw Sally, respondent called Sally "all the time" and tried to call Sally "at least every day or every other day[.]" Sally was available to talk "[u]nless she was at school or . . . asleep." Petitioner told respondent that he could not visit Sally unless he sent financial support.

Respondent called Sally until January 2014, about a week before Sally's 1 February 2014 birthday, when respondent and petitioner "[f]ell out." Petitioner either refused to answer respondent's calls and texts or would argue with respondent. Respondent continued trying to contact Sally but stopped after about a month of unsuccessful attempts.

In addition, at the conclusion of the hearing, Sally's guardian *ad litem* recommended that the trial court *not* terminate respondent's parental rights because petitioner and respondent's dispute "essentially boils down to a communication problem."[5] He noted that "in the beginning" respondent "played a very active role in the child's life" but then that petitioner had "moved around several times, no fault of her own[.]" With petitioner and the child living in Arizona, he noted that "it's hard to say, now that [respondent] has [the] financial ability to see the child[.]" As both petitioner and respondent testified that respondent called Sally during roughly half of the relevant six-month period, from November 2013 to January 2014, and asked petitioner if he could attend Sally's birthday party in February 2014, we hold that clear, cogent, and convincing evidence does not support the trial court's finding that respondent "failed to maintain communications" with Sally during the relevant time. In addition, even during the last half of the six-month period, the evidence tended to show that respondent attempted to communicate with Sally but petitioner stopped allowing him to contact her. The guardian *ad litem* characterized the issue as a "communication problem" based at least in part upon petitioner's relocations and ultimate move to Arizona. Thus, there is no clear, cogent, and convincing evidence to support the challenged factual findings in Findings of Fact 15 and 18.

ii. Conclusion of Law

Respondent challenges the trial court's conclusion of law that he had willfully abandoned Sally under N.C. Gen. Stat. § 7B-1111(a)(7). This conclusion of law is found primarily in Finding of Fact 18, as noted above:

> 18. The Court finds as a matter of law that statutory grounds do exist to terminate the parental rights of the

5. The record on appeal lacks the trial court's order appointing Sally's guardian *ad litem* pursuant to N.C. Gen. Stat. § 7B-1108 (2013) and the guardian *ad litem*'s written report. The trial court mentioned in its order that the guardian *ad litem* had been "duly appointed" and that the guardian *ad litem* had provided a written report to the court, "in addition to his oral summary of his findings which were presented at the hearing." Since we do not have the written report, we have considered only the oral summary presented at the hearing.

> respondent in that the respondent, specifically for a period of at least six (6) months preceding the commencement of the instant action and generally since April of 2013, has willfully abandoned the minor child. . . .

The only related conclusion of law which is denominated as such is Conclusion of Law 4: "It is in the best interests of the minor child that the parental rights of the respondent-father . . . be terminated and statutory grounds exist which justify this termination of the respondent's parental rights."

N.C. Gen. Stat. § 7B-1111(a)(7) provides that the trial court may terminate parental rights upon concluding that the "parent has *willfully* abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C. Gen. Stat. § 7B-1111(a)(7) (emphasis added).

We preliminarily note that the petition here failed to allege any particular statutory basis upon which petitioner was seeking to terminate respondent's parental rights. Indeed, the petition did not mention the relevant statute, N.C. Gen. Stat. § 7B-1111, and did not even use any variation of the word "abandon." *See In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002) ("While there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue."). In addition, at the termination hearing, none of the parties nor the trial court ever mentioned the ground of abandonment or even used the word "abandon" or other terms which would indicate a willful abandonment, such as "relinquish" or "surrender." The first time the ground of abandonment is mentioned in the record is in the termination order itself. Nevertheless, we address whether the remaining findings of fact—other than Finding of Fact 15 and the challenged factual portion of Finding of Fact 18, as discussed above—support the conclusion of abandonment as the ground for termination since respondent did not raise the failure of the petition to give adequate notice of the grounds upon which termination was sought at trial or on appeal.

> Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child[.] Willfulness is more than an intention to do a thing; there must also be purpose and deliberation. Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence.

. . . .

> A judicial determination that a parent willfully abandoned her child, particularly when we are considering a relatively short six month period, needs to show more than a failure of the parent to live up to her obligations as a parent in an appropriate fashion; *the findings must clearly show that the parent's actions are wholly inconsistent with a desire to maintain custody of the child.*

In re S.R.G., 195 N.C. App. 79, 84-87, 671 S.E.2d 47, 51-53 (2009) (emphasis added and citations and quotation marks omitted). In *S.R.G.*, this Court compared the following cases in its discussion of the ground of abandonment:

> *Compare* [*In re Adoption of Searle*, 82 N.C. App. 273, 276-77, 346 S.E.2d 511, 514 (1986)] (finding that the respondent's single $500.00 support payment during the relevant six-month period did not preclude a finding of willful abandonment) and *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982) ("except for an abandoned attempt to negotiate visitation and support, respondent 'made no other significant attempts to establish a relationship with the child or obtain rights of visitation with the child' ") *with Bost v. Van Nortwick*, 117 N.C. App. 1, 19, 449 S.E.2d 911, 921 (1994) (finding no willful abandonment where respondent, during relevant six-month period, visited children at Christmas, attended three soccer games and told mother he wanted to arrange support payments)[, *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995)].

S.R.G., 195 N.C. App. at 85-86, 671 S.E.2d at 52 (brackets omitted). The respondent in *S.R.G.* "visited [the child] eleven times during the relevant time period[,]" "brought appropriate toys and clothes for [the child] to those visits[,]" and "participate[d] in one of the trial proceedings during the relevant time period." *Id.* at 86, 671 S.E.2d at 52. This Court held that although the respondent's "conduct of continuing substance abuse and her failure to follow through with her case plan represent[ed] poor parenting," "her actions during the relevant six month period d[id] not demonstrate a purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [the child] pursuant to N.C. Gen. Stat. § 7B-1111(a)(7)." *Id.* at 87-88, 671 S.E.2d at 53.

As discussed above, some of the factual portions of Findings of Fact 15 and 18 were not supported by clear, cogent, and convincing evidence. [6] The remaining findings of fact address identification of the parties and jurisdictional facts (FOF 1-4); reasons for petitioner's move to Arizona in 2014 (FOF 5-6); circumstances at the child's birth (FOF 7); petitioner's automobile accident, move to Virginia, and move to Arizona in 2009 (FOF 8-11); petitioner's return to North Carolina and respondent's visit with the child in March 2013 (FOF 12-13); respondent's attempt to send petitioner a money order in April 2013 (FOF 14); and the child's current family relationships and circumstances in Arizona (FOF 19-22). None of these address factual grounds which could support a conclusion of abandonment and some of them address events outside the relevant six-month period preceding the filing of the petition. The only other findings of fact which could potentially support a conclusion of abandonment are the following:

> 16. The Court specifically notes that there have been no cards or gifts from the respondent to the minor child since early 2013.
>
> 17. The Court further notes that prior to the petitioner's filing of the instant action, the respondent made no filings that were initiated by him in this jurisdiction, or any other jurisdiction, concerning the custody of the minor child.
>
> 18. . . . Since April of 2013, the respondent has failed to provide or attempt to provide any financial support for the welfare and benefit of the minor child[.] . . .

Even if these findings are correct, these findings alone are not sufficient to support a conclusion of willful abandonment. We hold that these findings do not demonstrate that respondent had a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims" to Sally. *See id.*, 671 S.E.2d at 53. Following *S.R.G.*, we hold that the trial court erred in concluding that respondent had willfully abandoned Sally under N.C. Gen. Stat. § 7B-1111(a)(7). *See id.*, 671 S.E.2d at 53. Because abandonment was the sole ground for termination found by the trial court, we hold that the trial court erred in terminating respondent's parental rights, and we reverse the order.

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6. Finding of Fact 18 is a mixed finding of fact and conclusion of law; we will address one other factual portion of Finding of Fact 18 which was not addressed above.

C. Disposition

[4] Respondent also argues that the trial court erred in concluding that terminating his parental rights was in Sally's best interests without making the written findings of fact as required by N.C. Gen. Stat. § 7B-1110(a) (2015). *See In re J.L.H.*, 224 N.C. App. 52, 59-60, 741 S.E.2d 333, 338 (2012) (holding that the trial court erred in failing to make written findings regarding relevant criteria under N.C. Gen. Stat. § 7B-1110(a)). A relevant factor is one that has "an impact on the trial court's decision[.]" *In re D.H.*, 232 N.C. App. 217, 221-222, 753 S.E.2d 732, 735 (2014). But because we have already determined that the trial court erred in concluding that there were grounds to adjudicate the termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)(7), we need not address respondent's argument regarding the lack of findings as to disposition.

D. Delay in Entry of Order

[5] In addition, we note that the adjudicatory and dispositional hearing took place on 26 January 2015, but the trial court did not enter the termination order until 23 July 2015, roughly six months later. N.C. Gen. Stat. § 7B-1109(e) provides in pertinent part:

> The adjudicatory order shall be reduced to writing, signed, and entered *no later than 30 days* following the completion of the termination of parental rights hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

N.C. Gen. Stat. § 7B-1109(e) (2015) (emphasis added). Regarding the dispositional stage, N.C. Gen. Stat. § 7B-1110(a) similarly provides in pertinent part:

> Any order shall be reduced to writing, signed, and entered *no later than 30 days* following the completion of the termination of parental rights hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court

> scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

N.C. Gen. Stat. § 7B-1110(a) (emphasis added). Our Supreme Court explained that in the event that a trial court fails to comply with the procedure described above, a party may petition this Court for a writ of mandamus. *In re T.H.T.*, 362 N.C. 446, 456, 665 S.E.2d 54, 60-61 (2008). "[I]n almost all cases, delay is directly contrary to the best interests of children, which is the 'polar star' of the North Carolina Juvenile Code." *Id.* at 450, 665 S.E.2d at 57. We note that the trial court violated N.C. Gen. Stat. § 7B-1109(e) and N.C. Gen. Stat. § 7B-1110(a) by entering its termination order roughly six months after the adjudicatory and dispositional hearing.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's order terminating respondent's parental rights.

REVERSED.

Judges BRYANT and DIETZ concur.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Petitioner
v.
CHAUNCEY JOHN LEDFORD, Respondent

No. COA15-595

Filed 3 May 2016

1. Public Officers and Employees—discharge—political discrimination—prima facie showing—working for public agency in non-policymaking position

In an action by a discharged State employee who alleged political discrimination, the employee met the first element of the required prima facie case by showing that he had worked for a public agency in a non-policymaking position at the time of his termination. He had

been the Alcohol Law Enforcement (ALE) Director (a policymaking position) before requesting a return to the field as an ALE Special Agent ahead of the governor's office changing to a new party. He was discharged as a Special Agent.

2. Public Officers and Employees—discharge—political discrimination—prima facie showing—party affiliation

A discharged State employee who alleged political discrimination met the second element of the required prima facie showing, affiliation with a certain political party, where the record disclosed substantial evidence of the employee's affiliation with the Democratic Party.

3. Public Officers and Employees—discharge—political discrimination—prima facie showing—discharge politically motivated

In an action by a discharged State employee who alleged political discrimination, the trial court did not err by admitting statements alleged to be hearsay on the issue of the third element of plaintiff's prima facie case, that the discharge was politically motivated. The statements were not offered to prove the truth of the matters asserted, but to show the mental states and motives of the speakers. Moreover, Administrative Law Judges have broad discretion to admit probative evidence, and admitting this testimony was not an abuse of discretion.

4. Evidence—discharge of State employee—political discrimination—relevance—prejudice

In an action by a discharged State employee who alleged political discrimination, testimony concerning statements made that the chief operating officer of the agency were relevant and not prejudicial. The challenged testimony was highly probative and its probative value was not substantially outweighed by the danger of unfair prejudice.

5. Public Officers and Employees—discharge—political discrimination—legitimate nondiscriminatory reason

An administrative law judge did not err by concluding that Ledford proved the legitimate nondiscriminatory reason the Department of Public Safety articulated for Ledford's termination was merely a pretext for political affiliation discrimination. The conclusion was strongly supported by the record.

6. Public Officers and Employees—discharge—political discrimination—public policy

The State's argument that it would be bad policy to uphold an administrative law judge's decision that a state employee was discharged for political reasons because it would entrench partisan political employees was declined.

Appeal by Petitioner from order entered 29 December 2014 by Judge C. Philip Ginn in Madison County Superior Court. Heard in the Court of Appeals 4 November 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for Petitioner.

Leake & Stokes, by Larry Leake, for Respondent.

STEPHENS, Judge.

Petitioner North Carolina Department of Public Safety ("DPS") appeals from the trial court's order affirming the Final Decision of the Office of Administrative Hearings ("OAH") by Senior Administrative Law Judge ("ALJ") Fred G. Morrison, Jr., in favor of Respondent Chauncey John Ledford on his claim for political affiliation discrimination. DPS argues that ALJ Morrison erred in concluding that Ledford satisfied his *prima facie* burden and proved by a preponderance of the evidence that the purportedly legitimate nondiscriminatory reasons DPS articulated for terminating him were merely pretextual. We affirm.

Factual Background

Ledford was born on 8 July 1965 and grew up in Madison County, where his father, a registered Democrat, served as a member of the Board of Commissioners for 20 years. In 1990, Ledford began a career in law enforcement as a Buncombe County Deputy Sheriff. In September 1993, Ledford joined the Alcohol Law Enforcement Division ("ALE") as a Special Agent in its field office in Asheville, where he served for just over five years and eventually attained the rank of Special Agent II, which was the highest available under the Division's then-extant system of classification. In the years since, ALE has adopted a three-tiered system of classifying its Special Agents based on their experience and competence into Contributing-, Journeyman-, and Advanced-levels, with recurring postings for vacancies to provide opportunities for lower level agents to compete for promotions between these ranks and pay increases within them.

In November 1998, Ledford, a registered Democrat since the age of 18, was elected Sheriff of Madison County. Although he resigned from his employment with ALE at that time, Ledford subsequently rejoined ALE as a Special Agent Reserve in 2002 and continued to serve in that capacity throughout the next seven years of his tenure as Sheriff.

In October 2009, Ledford was appointed Director of ALE by Governor Beverly Perdue upon the recommendation of her appointed Secretary of Crime Control & Public Safety, Reuben Young. As Director of ALE, Ledford served in a policy-making exempt position until the expiration of Governor Perdue's term at the end of 2012. During Ledford's tenure as Director, ALE merged with several other State law enforcement agencies into the newly created DPS, of which Young was named Secretary. In January 2012, in his final performance evaluation as Director, Ledford was assessed at the Advanced competency level and his performance was rated as "Outstanding" by his superiors. Throughout his years in law enforcement, Ledford completed hundreds of hours of advanced law enforcement training through the FBI National Academy, the DEA Drug Unit Commanders Academy, and the State's Sheriffs Training Standards Division. He also became a certified general instructor for the State, with a specialized firearms instructor certification, and taught courses in ALE basic training programs and at the community college level.

In late 2012, Ledford decided that he wanted to return to the field as an ALE Special Agent after his term as Director concluded. During a training exercise in Wilmington in late October, Ledford approached Secretary Young about the possibility of obtaining a reassignment to ALE's district office in Asheville. Secretary Young advised Ledford that although he was unfamiliar with the necessary procedures for approving such a move, he was receptive to the idea, provided it could be done ethically and legally. The subject came up again several days later during a meeting in Raleigh among Secretary Young, Ledford, Chief Operating Officer of DPS Mikael Gross, Deputy Director of Operations for ALE Richard Allen Page,[1] and Director of Human Resources for DPS Alvin Ragland. After further discussion, Young directed Ledford to begin the process of requesting a reassignment and also asked Gross and Ragland to determine the legal and logistical requirements to facilitate the process.

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1. ALE's Deputy Director of Operations, Richard Allen Page, had also previously worked in the Asheville office and made a similar reassignment request in late 2012 which followed a similar approval procedure to the process discussed *infra* for Ledford's request. Page was ultimately reassigned to serve as the Special Agent in Charge ("SAC") of ALE's Asheville office, where he served as Ledford's supervisor until April 2013.

Pursuant to Young's request, Gross asked ALE Deputy Director for Law Enforcement Services Mark Senter whether there were any openings for a Special Agent in the Asheville office. Senter advised Gross that although there was a vacant position for a Contributing-level Special Agent in the Wilmington office, there were currently no open postings in Asheville. However, Senter also determined, based on a 2010 ALE needs-assessment and the recent retirement of an Asheville-based agent, that there was a clear business need for an additional Special Agent in the Asheville office, and that that need was greater than the need for an agent in Wilmington. Gross concluded that pursuant to section 18B-500(g) of our General Statutes, which provides authority for shifting ALE personnel from one district to another, see N.C. Gen. Stat. § 18B-500(g) (2015), Secretary Young could lawfully transfer the vacant Wilmington Special Agent position to the Asheville office and reclassify it from the Contributing-Level to the Advanced-Level to reflect Ledford's competency level. Senter consulted with DPS Deputy Director of Human Resources, Tammy Penny, who advised him that "the position would still have to be posted . . . . to ensure we meet the statut[ory] requirement [imposed by N.C. Gen. Stat. § 126-7.1(a)] to make a position vacancy available via a minimum of a 5[-]day posting except for certain situations defined in policy" by the Office of State Personnel ("OSP") and in the State Personnel Manual. After consulting Section 2, Page 21 of the State Personnel Manual, which provides guidelines for the recruitment and posting of vacancies and lists examples for which posting requirements are inapplicable, Gross concluded that the vacant Special Agent position would not need to be posted publicly or as part of ALE's internal competitive applications process. In addition, based on their review of Section 4 of the State Human Resources Manual, which governs salaries for State employees who are demoted or reassigned, Gross and Senter determined that Ledford's salary would have to be reduced to the maximum available for an Advanced-level Special Agent.

Meanwhile, Ragland contacted the Interim Director of OSP, Ann Cobb, to inquire regarding the legality of Ledford's requested reassignment. Cobb informed Ragland that such a reassignment was legally permissible. Cobb later testified that although she advised Ragland that "the reassignment technically could be done, that an agency head can waive posting, can transfer a position and have a reassignment down of an employee," she also sounded a note of caution that such a reassignment "was something to be very careful with, that there needed to be a strong business case for doing it, and that it could be challenged by employees or applicants who were interested in those positions." Cobb testified further that she advised Ragland that because Ledford needed three

more years of service before he qualified as a career State employee, he would not be entitled to the protection from termination afforded to such employees, which meant that a new administration could terminate him without just cause.

On 27 November 2012, Ledford formally requested reassignment from his position as Director to a position as a Special Agent in Asheville, effective 1 January 2013. In a memorandum to Secretary Young, Ledford stated that it was his understanding that "because my current salary exceeds the maximum pay grade for the Special Agent position, [OSP] requires a salary reduction to the maximum of my assigned position." On 29 November 2012, Ledford signed a Personnel Action Clearance ("PAC") Form requesting reassignment to an Advanced-level Special Agent position with a salary set at $65,887.00, which was the maximum available for his requested position and represented a 41% reduction from his $110,667.00 salary as ALE Director. Ledford later testified that the purpose of this PAC Form was to ensure that every individual who needed to review the propriety of the requested personnel action had the opportunity to do so as it moved through the approval process, and that his signature as "Division Director" was required to verify that his most recent employee performance evaluation was consistent with the action recommended. The form was subsequently approved and signed by Gross as Deputy Secretary for DPS, Ragland for Human Resources, Marvin Mervin for Fiscal, and Secretary Young. Young also cleared the request with Governor Perdue's office, which advised him that as long as the move was legal, the Governor had no objections. On 19 December 2012, Young issued a memorandum approving Ledford's reassignment request to a Special Agent position in ALE's Asheville office. The position was formally transferred on 1 January 2013, and Ledford began his new employment as an Advanced Special Agent for the Asheville ALE office the next day.

In the months following his return to the field, Ledford led all agents in his new district in arrests made, and his supervisors did not receive any complaints about his performance. However, Gross, who served as DPS liaison for Republican Governor-elect Pat McCrory's Justice and Public Safety transition team in December 2012, subsequently testified that when he was asked during a transition team meeting whether or not any exempt DPS employees were being moved to non-exempt positions, he replied that Ledford was one of three such DPS employees.[2]

2. The other two exempt DPS employees moved to non-exempt positions were Page and the former Director of Prisons. There is no indication in the record before us that either was investigated or disciplined as a result of their reassignments.

Gross testified further that after news broke of Ledford's reassignment, he received a phone call from Henderson County Republican State Senator Tom Apodaca, who informed Gross that Ledford's reassignment "shouldn't have occurred and that they're going to fix that if they even have to just get rid of the position in the budget." Gross then reported Apodaca's statement to incoming-DPS Secretary Kieran J. Shanahan two days before Shanahan's scheduled swearing-in. Gross testified that during their time together on the transition team, he and Shanahan had had "intimate conversations about personnel, personnel decisions, transition, [and] recommendations for employment" within DPS. When Gross conveyed Apodaca's statement to Shanahan, Shanahan agreed, stating, "Well, you know, [Ledford's reassignment] really shouldn't have happened."

On 6 February 2013, ALE Advanced-level Special Agent Kenneth Simma filed a grievance with the SAC of his district alleging that Ledford's reassignment, which Simma referred to as a "demotion," was "in direct violation of the existing [ALE] policy and contrary to all existing statute[s]." Specifically, Simma complained that Ledford's new position should have been posted so that other Advanced-level ALE Special Agents could have had an opportunity to compete for the higher pay that accompanied it. Simma also questioned Ledford's qualifications for an Advanced-level position, and alleged that Ledford's new salary created a division-wide salary inequity. Simma's grievance was denied by his district's SAC on 8 February 2013, and by ALE Acting Director Senter on 13 February 2013, both of whom concluded that the matters Simma raised in his grievance were non-grievable issues.

Simma subsequently testified that he had previously been subjected to disciplinary action by Ledford when Ledford was ALE Director; that he had received outside assistance in preparing his grievance; and that he shared his grievance with another ALE Advanced-level Special Agent, Patrick Preslar, who then filed a nearly identically worded grievance against Ledford on 15 February 2013. Preslar's grievance was denied as non-grievable by his district's SAC on 19 February 2013, and Senter reached the same conclusion on appeal on 25 February 2013. Both Simma and Preslar appealed the denial of their grievances directly to Secretary Shanahan, who likewise concluded that the issues they raised were non-grievable, and thus denied their appeals. Shanahan outlined his reasoning in a memo addressed to Simma dated 4 March 2013, in which he explained that Simma's allegation of a division-wide salary inequity did not constitute a dispute over performance pay and was not timely filed; that despite Simma's complaint that Ledford's new position

should have been posted, the ALE's Grievance Policy "does not afford employees a right to file a grievance for failing to post a vacant position"; and that although ALE agents could grieve a "denial of promotion due to failure to post," they could only prevail "when such failure arguably resulted in the grievant being denied a promotion," a requirement that Simma could not satisfy since he was already an Advanced-level Special Agent. Shanahan stated similar bases for rejecting Preslar's appeal.

The grievances Simma and Preslar filed against Ledford were also reviewed by DPS Employee Relations specialist Margaret Murga. On 19 February 2013, Murga sent an email to DPS deputy general counsel Joseph Dugdale inquiring whether he had reviewed the grievances. Neither Murga nor Dugdale had any involvement in Ledford's reassignment, but on 25 February 2013, Dugdale replied via email to Murga that the issues raised by Simma and Preslar were non-grievable and that the "position did not have to be posted in this case because G.S. 126-5(e) specifically allows the [DPS] Secretary to demote an exempt employee from his or her position in the department." Dugdale stated further that 25 NCAC 01h. 0631(e)(8) provides an exemption from the general posting requirement for "[v]acancies to be filled by an eligible exempt employee who has been removed from an exempt position and is being placed back in a position subject to all provisions of the State Personnel Act." The next day, after Murga replied to ask Dugdale whether Ledford had been demoted or reassigned, Dugdale responded that Ledford "was transferred to a lower position, his salary was reduced and his responsibilities are less demanding; therefore it is a demotion." In response, Murga sent Dugdale an email with the notation "fyi" and a 26-page attachment that included documentation from Ledford's reassignment. On 27 February 2013, Dugdale replied to Murga that he had reviewed the documents she had sent him, believed they "tend[ed] to shed a somewhat different light on what happened in the 'reallocation' of Director Ledford," and posed a list of approximately 10 follow-up questions for Murga to investigate, including whether Ledford had been reassigned to a vacant position or had been transferred into a newly created position; whether the position was required to be posted; whether Ledford's transfer should have been approved by OSP and, if so, whether it had been and by whom; and whether it was normal practice for Gross to have signed off on Ledford's PAC Form as Deputy Director.

In the weeks that followed, Murga reviewed ALE and OSP policies regarding salary and posting requirements; found evidence of three or four instances in 2012 when openings for Advanced-level ALE Special Agent positions had been posted internally for competitive applications;

confirmed that Ledford's new position had originally been classified as a Contributing-level opening in ALE's Wilmington office; and concluded that Ledford's position had never been posted, nor had an updated job description been provided, nor had OSP given approval to re-classify it from the Contributing- to the Advanced-level. However, Murga later testified that she was unaware that there had been a need for another Special Agent in the Asheville office since 2010, and she also acknowledged that she had been unable to fully answer several of Dugdale's questions—and had provided erroneous answers to others—because she did not speak to anyone involved in the decision-making process for Ledford's reassignment during her investigation into Ledford's reassignment.

At some point, Dugdale advised Commissioner of Law Enforcement Frank Perry that Murga had discovered that "there was more to [the] story" of Ledford's reassignment, and Perry urged Dugdale to continue to articulate, record, and discuss the findings from Murga's investigation. In early March, Murga and Dugdale met with several OSP representatives, who informed them that Ledford's new position should have been posted. Murga then relayed her findings to her supervisor, DPS Employee Relations manager Kim Davis-Gore. On 14 March 2013, Murga and Dugdale shared the results of their investigation with Perry during a brief meeting. That same day, Dugdale authored a memo to Perry in which he explained that Davis-Gore had consulted with HR and OSP regarding the alleged irregularities involved in Ledford's reassignment and "provided what they consider to be two (2) viable options" for addressing the situation. As Dugdale explained:

> Option 1 is to simply ignore the irregularities and maintain the status quo. Option 2 is to undo the wrong by moving the position back to Wilmington and readjusting it back to the contributing competency level since there is no supporting documentation to justify why it was upgraded other than to accommodate Director Ledford's request for a reallocation. They believe, however, that because John Ledford is currently in the position, he should be afforded an opportunity to transfer with the position.

Despite Davis-Gore's recommendations, Dugdale opined in his memorandum to Perry that while he agreed that affording Ledford the opportunity to transfer to Wilmington "is an option," he did not agree that it was required because Ledford "is not a career state employee and, therefore, is not afforded the protections of the State Personnel Act." Nevertheless, as Dugdale also cautioned, "It should be pointed out that [Ledford] most likely will challenge [DPS] in either event arguing

that the decision to move the position was based on his political affiliation" in violation of section 126-36 of our General Statutes, and thus DPS would "need to show that whatever action is taken, is based on an identifiable legitimate business need."

On 10 April 2013, Ledford received a telephone call from ALE Acting Director Senter, who informed Ledford that he had been ordered to terminate Ledford's employment and would be forwarding a memorandum authored by Perry ("the Perry Memo") explaining the reasons for this decision. The Perry Memo, a version of which was hand-delivered to Ledford later that day,[3] explained that DPS's Employee Relations Section had "uncovered ethical and legal concerns" while reviewing the two grievances filed against Ledford's reassignment. Specifically, the Perry Memo characterized the fact that Ledford had signed the PAC Form he used to request his reassignment on the line designated for the ALE Director's signature as an "inappropriate deviation from normal practice [which] had the effect of sending a clear message that neither [HR] nor Fiscal had any real authority to deny your request." The Perry Memo also took issue with Ledford's salary, deeming it excessive, given that it made Ledford the highest-paid ALE Special Agent in the State, and in violation of State Personnel policy. Further, the Perry Memo stated that there had been no legitimate business need to transfer any Special Agent position from Wilmington to Asheville or to reclassify it from the Contributing-level to the Advanced-level, and that even if there had been a legitimate business need, the position should have been posted internally for competitive applications as required by State law and departmental policy. In light of the fact that Ledford did not qualify as a career State employee, the Perry Memo determined there was no lawful authority for Ledford's reassignment from his exempt position as Director to a non-exempt position, and therefore concluded that Ledford's "so-called 'reassignment' was nothing more than an attempt to circumvent the provisions of the State Personnel Act in that, at the time you submitted your request, you knew a new Department Head would be appointed effective January 1, 2013," once Governor McCrory took office, "and that it was inevitable that you would be separated from state service." Finally, as the Perry Memo summarized, Ledford

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3. As detailed *infra*, the version of the Perry Memo that Ledford received was dated 9 April 2010 and had not been signed by Perry. However, it became clear during the subsequent OAH hearing that Perry had signed a different version of the memo dated 10 April 2013, which DPS considered the official copy. Ledford's counsel cross-examined Perry extensively on the differences between these two versions, which were stylistic, rather than substantive.

> either knew, or should have known: 1. that your reassignment circumvented the existing statutory scheme pertaining to policy exempt employees; 2. that by reassigning yourself to a position to which you were not entitled, you violated the promotional rights of subordinate employees; 3. that, even if you were entitled to a reassignment to a Special Agent position, the salary requested and approved is excessive pursuant to state personnel policy; and 4. the approved salary amount exceeds the salary of every other Special Agent in the division, thereby creating an unwarranted salary inequity. As ALE Director, you knew or should have known that you did not have any reassignment rights, that it was inappropriate to reallocate and subsequently transfer a position for any purpose other than a legitimate business need, that the position you were "reassigned" to was required to be posted, and that your new salary was clearly excessive. Accordingly, your participation in the events described herein cannot be viewed as anything less than unacceptable personal conduct on your part.

The Perry Memo concluded by informing Ledford that he would be terminated effective immediately, that he had no right to appeal the decision, and that his position in Asheville would be moved back to Wilmington and reclassified at the Contributing-level due to the "total lack of any identifiable legitimate business need to justify" the original transfer. The Perry Memo was subsequently released to the media. On 17 April 2013, Secretary Shanahan sent an email to Governor McCrory's Chief of Staff, Thomas Stith, detailing several scheduled public forums and providing a link to a news story on the *Asheville Citizen-Times* website covering Ledford's termination. In his email, Shanahan advised, "Thought you and G should be aware of Ledford dismissal—done by the book. Assume it will be appealed."

Procedural History

On 8 May 2013, Ledford filed a petition for a contested case hearing with the OAH, alleging that his dismissal was without just cause and resulted from discrimination based on his political affiliation in violation of N.C. Gen. Stat. § 126-34.1(a)(2)(b) (2011), *repealed by* 2013 N.C. Sess. Law 382, § 6.1.[4] On 16 August 2013, DPS filed a motion to dismiss

4. Ledford's petition was timely filed before our General Assembly's repeal of section 126-34.1 became effective on 21 August 2013.

Ledford's claim for dismissal without just cause, given the fact that Ledford was not a career State employee, as well as a motion for summary judgment regarding Ledford's political affiliation discrimination claim. By order entered 1 November 2013, ALJ Morrison granted DPS's motion to dismiss Ledford's claim for dismissal without just cause, but denied the motion for summary judgment.

A three-day hearing on Ledford's political affiliation discrimination claim began on 2 December 2013 with ALJ Morrison presiding. During the hearing, Ledford testified that he had requested to be reassigned as a Special Agent because he missed working in the field and wanted to continue serving the State. Ledford testified further that apart from making initial inquiries about the proper way to return to the field, he was minimally involved in the decision-making process surrounding his reassignment and that Gross and Ragland had researched the appropriate procedures and told him that everything checked out. Ledford denied the Perry Memo's accusation that he approved his own reassignment, testified that it was his regular duty as ALE Director to sign employee PAC Forms in order to verify that their most recent performance evaluations were consistent with the personnel actions recommended, and explained that he had signed his own PAC Form in order to ensure that every individual who needed to review the propriety of his requested reassignment had the opportunity to do so as it moved through the approval process. Ledford also testified that there had indeed been a legitimate business need to reallocate a Special Agent position to Asheville, and noted that irrespective of the Perry Memo's promise to move the vacancy back to Wilmington, the number of ALE Special Agents in the Asheville office had remained the same as before his dismissal. Regarding his salary, Ledford testified on cross-examination, "The extent of my involvement in the setting of my salary was somebody walked into [my office] and handed me a piece of paper that says, you're taking a 41 percent reduction in pay, and this is your salary. And that's it." In addition, Ledford testified that not all vacancies that had arisen during his tenure as ALE Director had been posted, and it was his understanding that OSP and the State Personnel Manual provided for exceptions from the general posting requirement. Regarding his dismissal, Ledford noted his surprise to learn that he was even being investigated, let alone terminated, in light of the ALE's then-extant disciplinary procedures, which required that all employees, including probationary employees, be advised of any allegations against them and afforded an opportunity to respond before being subjected to discipline.

Ledford also presented testimony during his case-in-chief from Gross, who testified about the phone call he received from Senator Apodaca and incoming-Secretary Shanahan's reaction to it. When DPS objected to this testimony on the basis of hearsay, the following exchange occurred:

> [DPS Counsel]: Objection, Your Honor. I don't believe Senator Apadaka [sic] is a witness here today. He hasn't been identified. We're into hearsay testimony now for sure.
>
> THE COURT: Well, he can say that he got a call.
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> [DPS Counsel]: And that wasn't my objection, Your Honor. He's testifying to exactly what Senator Apadaka [sic] may or may not have told him, which is not just, I received a phone call from Senator Apadaka [sic]. I wouldn't have an objection to hearsay on that grounds because he's not getting into the truth of what's been asserted.
>
> THE COURT: Well, I tell you, because he's an officer of the [c]ourt, an attorney and all, and the OAH rules provide that an ALJ can admit any evidence that has probative value and determine what weight to give it, I'm going to overrule the objection and let him testify because hearsay is if it's unreliable and all, so I overrule.

Gross also testified that he reviewed Section 2, Page 21 of the State Personnel Manual and concluded that the position to which Ledford was reassigned did not need to be posted because it fit the exception for a vacancy "to be filled by an eligible exempt employee who has been removed from an exempt position and is being placed back in a position subject to all provisions of the State Personnel Act." Regarding Ledford's salary, Gross testified that he and Senter determined that State policy required that it be set at the maximum available rate for an Advanced-level Special Agent based on their review of Section 4, Page 29 of the State Human Resources Manual, which provides that "[w]hen the employee's current salary is above the maximum of the range for the lower class, the salary shall be reduced at least to the maximum of the lower range." Gross acknowledged that Ledford's new salary might not have been popular among the ALE's ranks because, as he explained,

> I've worked for ALE for a number of years and I've worked in State government for a lot of years. And when it comes to salary, everybody is unhappy. I don't believe that any one person in ALE who [has] ever watched somebody else

> get promoted has not said, "They don't deserve it," or, "I would have done a better job." I believe that no matter who would have been put in [Ledford's] position, no matter if anybody made $1,000 more, somebody else would have said "There's an inequity," and they would have thought that it was grievable.

Nevertheless, Gross testified that Ledford's salary did not result in a grievable inequity because State policy required it and also because the next highest paid ALE Advanced-level Special Agent at the time of Ledford's termination had a salary of approximately $61,000.00, and "in order for there to be a grievable inequity, there has to be more than $10,000 between the person who is at top pay and the next person below him."

In addition to Gross's testimony, Ledford presented testimony from the other individuals who were directly involved in the decision-making process that led to his reassignment. Senter, Page, and Ragdale each testified that there had been a legitimate need for an additional Special Agent in Asheville; that they believed OSP regulations allowed for Ledford's reassignment without posting the position and required that his salary be set at the maximum rate available; and that they could not remember a single previous instance when an ALE employee had been terminated by telephone or any other method without first being advised of the allegations against him and afforded an opportunity to respond to those allegations. Indeed, Senter testified that although it was common for HR and DPS to review grievances from ALE employees, he was unaware of any prior examples of such reviews resulting in disciplinary investigations like the one conducted by Murga and Dugdale. Both Senter and Page continued to work for ALE after the McCrory Administration took office, but neither was approached by Murga, Dugdale, Perry, or anyone else during DPS's disciplinary investigation into Ledford's reassignment.

Former Secretary Young testified that although he was unaware of any previous instances of an ALE Director or other policymaking exempt employee being transferred downward, he was certain that Ledford had not reassigned himself. Young testified further that the ultimate decision to approve Ledford's request was his own to make; that he was satisfied that Gross, Senter, and Ragland had followed appropriate procedures in terms of transferring the position to Asheville and reclassifying its experience level; and that neither OSP nor HR nor the Governor's office had objected. Young also testified that Ledford's salary was legally permissible and, although he conceded on cross-examination that in his view, Section 4 of the State Human Resources Manual did not *require*

Ledford's salary to be set at the maximum rate, he believed it was appropriate for an employee with Ledford's experience and qualifications. Indeed, Young testified that he believed it had been in ALE's best interests to retain Ledford as a Special Agent, given his longstanding dedication to the Division and the fact that Ledford "was probably one of the most hard-working and one of the most loyal employees I have ever worked with or had ever been around. Quite frankly, in that position, I wish I would have had twenty thousand more of [him]."

At the close of Ledford's evidence, DPS made a motion for directed verdict in its favor, which ALJ Morrison denied. Throughout its case-in-chief, DPS contended that irrespective of whether Ledford could make out a *prima facie* case for political affiliation discrimination, his claim should ultimately fail because his termination was based on the legitimate, nondiscriminatory reasons detailed in the Perry Memo. Murga and Dugdale testified about the investigation they undertook in response to the grievances filed by Simma and Preslar. In keeping with testimony by Cobb and Penny from OSP, both Murga and Dugdale testified that they did not believe OSP policy required Ledford's new salary to be set at the maximum rate; that they did not believe the exception to the posting requirement provided under Section 2, Page 21 of the State Personnel Manual that Gross had identified actually applied to Ledford's new position because in their view, Ledford did not qualify as an "eligible" employee, given that he had not yet attained career status; and that once Ledford assumed his new position, he was a non-exempt probationary employee who could be terminated for any reason so long as the reason was not illegal.

Murga testified further that she was unable to find any evidence that OSP had given approval to re-classify Ledford's new position to the Advanced-level; that she was unaware of any legitimate business need to transfer a position to Asheville; and that she believed the position should have posted internally for competitive applications as several other Advanced-level vacancies had been posted in 2012. However, Murga acknowledged on cross-examination that she never spoke to anyone who had been involved in the decision-making process for Ledford's reassignment.[5] Dugdale testified that although he initially believed

5. For example, Murga reported to Dugdale that she did not know why Gross had signed off on Ledford's PAC Form instead of Chief Deputy Secretary Rudy Rudisell, who she believed should have signed the form instead. However, during the OAH hearing, Ledford and Gross both testified that Rudisill had been removed from the chain of command within ALE, leaving Gross to fill in and report directly to Secretary Young. When

Ledford's reassignment was proper when Murga brought her concerns to his attention, he now believed that he should have been consulted directly during the decision-making process. Dugdale testified further that he viewed the fact that Ledford had signed off on his own PAC Form as "totally inappropriate" and considered Ledford's request for the maximum available salary a "total breach of trust." Dugdale also testified that although Murga's supervisor, Davis-Gore, had provided only "two viable options" for how DPS should deal with the situation—either do nothing or else allow Ledford the opportunity to transfer to Wilmington—the OSP representatives he and Murga had met with prior to informing Davis-Gore of their investigation's findings had indicated that they would be "comfortable" with Ledford's dismissal. Like Murga, Dugdale testified that during the investigation of Ledford's reassignment, he had not spoken to anyone involved in the decision to approve Ledford's request.

By the time of the hearing, Perry had been promoted by Governor McCrory to the position of DPS Secretary. Perry testified that he first learned of Ledford's reassignment in the "Under the Dome" section of the *News & Observer* (Raleigh), but did not look any deeper into the matter until Dugdale notified him of Murga's investigation, and that he never consulted with Secretary Shanahan or Governor McCrory or anyone other than Dugdale or Murga about Ledford's reassignment or the two grievances filed against him. When asked on direct examination why he chose to dismiss Ledford despite the fact it was not among the "two viable options" Davis-Gore had recommended, Perry emphasized the total lack of any State or federal precedent to allow for an action like Ledford's reassignment, which he believed, based on his discussions with Dugdale and Murga, amounted to "simply self-dealing to the level of a violation of law and policy." When asked why he did not consult with anyone who had been involved in the decision-making process for approving Ledford's reassignment, Perry stated that, "I felt to keep it clean, I need not consult others; and I made the decision based on the evidence I saw." When asked on cross-examination on what specific evidence he based his determination that Ledford's reassignment violated State law and OSP policy, Perry alluded to the fact that Ledford's new

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Murga testified, she admitted she had not spoken to anyone involved in the decision-making process for Ledford's reassignment and was consequently unaware that Gross had assumed Rudisill's responsibilities. Murga agreed that in light of this news, it was appropriate for Gross to have signed off on Ledford's PAC Form and thus conceded that her answer to Dugdale's question had been erroneous.

position was never posted and his reassignment had not been approved by OSP. However, Perry also conceded that he had no idea Cobb had been consulted as Interim Director of OSP in 2012 and had advised that the reassignment was, in fact, legal.

When asked for specific evidence to support his conclusion that Ledford had reassigned himself, Perry initially struggled to identify any basis to support his accusations of self-dealing before eventually testifying that Young's 19 December 2012 memo approving Ledford's reassignment "says that he had requested the assignment, 'he' being Ledford." Perry subsequently conceded that such a request would not itself be illegal, but insisted that "[i]t seems to me the reassignment in its totality was a matter of violation of State law and [OSP] policy" and later clarified that it was his understanding "that there was no precedent [for] this move, period." Throughout his testimony, Perry contended that the decision to dismiss Ledford was his alone; however, on cross-examination, Perry acknowledged that he was not the author of the Perry Memo and that he did not know who wrote it or why two different versions had been prepared. In addition, Perry acknowledged that after Ledford's dismissal, he signed a formal report to the Criminal Justice Enforcement and Training Standards Commission that stated that Ledford had not been subject to any investigation or inquiry concerning illegal or unprofessional conduct within 18 months of his dismissal.

On 31 December 2013, ALJ Morrison issued a Final Decision in this matter finding in Ledford's favor that his dismissal was the result of discrimination based on his political affiliation. In his Final Decision, ALJ Morrison made factual findings that Ledford was well-qualified to be an Advanced-level ALE Special Agent; that former Secretary Young had acted pursuant to his statutory authority in approving Ledford's reassignment request; that upon learning of Ledford's reassignment, incoming Republican officials in Governor McCrory's Administration had been disappointed Ledford was no longer in a policy-making exempt position where he would be subject to termination; that upon returning to the field in a non-exempt position, Ledford performed very well; that Perry had made his decision to terminate Ledford based largely on two already dismissed employee grievances despite the fact that Perry "knew nothing about [Ledford's] qualifications, never sought information from him, Secretary Young, his deputies, or his HR personnel" and "also ignored suggestions from employee relations and state personnel representatives to maintain the status quo or move the position and [Ledford] to Wilmington"; and that, contrary to ALE's internal disciplinary policy,

Ledford was never given notice of the charges against him or an opportunity to respond.[6]

Based on these findings of fact, ALJ Morrison concluded that Ledford had met his *prima facie* burden "by establishing that he was a very prominent Democrat non-policymaking employee of [DPS] brought in during a Democrat[ic] administration who was hoping to continue his State employment under an incoming Republican administration." Moreover, Ledford had also established that DPS

> treated him differently than other ALE Special Agents in failing to follow its own ALE internal disciplinary policy by not providing him notice of his being investigated; not allowing him an opportunity to respond to the charges against him by two disgruntled employees who[] had been disciplined; not involving his immediate supervisors in an investigation and decision to terminate his employment. [Ledford] has also raised inferences by showing [DPS] focused upon holding him responsible for actions by his Democrat[ic] superiors in late 2012 and terminating him without regard to the very good job he was doing as a field agent in 2013; failing to provide a probationary employee with any counseling or suggestions concerning how he could improve his job performance; ignoring suggestions from personnel and legal professionals to let the matter rest or transfer the position with [Ledford] back to Wilmington. The Republican transition team had inquired about DPS plans to move any exempt employees into non-exempt

6. ALJ Morrison also noted in his factual findings that DPS "failed to produce discovery in a timely manner. Some was produced on the evening of the last business day before hearing and during the hearing. This was prejudicial to [Ledford] as it required his counsel to spend excessive amounts of time seeking production of the discovery and affected [Ledford's] ability to conduct follow-up discovery and adequately prepare the case." We note here that the last business day before the hearing was the day before Thanksgiving, and that after 6:00 that evening, DPS sent Ledford's counsel an email with numerous attachments that included, *inter alia*, the memorandum Dugdale wrote to Perry informing him of the "two viable options" Davis-Gore provided for resolving the situation and other documents that had never previously been provided. We also note, however, that it appears from the OAH transcript these delays in discovery were not the fault of DPS's counsel, who appears to have conducted himself admirably under the circumstances given that, as he explained to ALJ Morrison, he, too, was without access to these documents until he received them from DPS on the last business day before the OAH hearing, when he was the only person left in his office and had to successfully navigate technological setbacks in order to scan, download, and email them to Ledford's counsel.

> positions prior to the administration change and were told of plans concerning [Ledford]. When informed about a Republican State Senator's negative remarks concerning the personnel transaction, Republican Secretary appointee Shanahan remarked "That should not have happened," indicating his state of mind coincided with the senator's and transition team's concerning [Ledford]. Finally, Secretary Shanahan thought it important to send an email at 9:47pm notifying the governor and his chief of staff that [Ledford] had been terminated, which suggests a political purpose was behind it. [Ledford] was a marked man politically.

After determining that Ledford had established his *prima facie* case, ALJ Morrison noted that the burden shifted to DPS to present evidence that Ledford's termination was based on a legitimate, nondiscriminatory reason and concluded that DPS had met this burden of production "by establishing that two disgruntled, formerly disciplined agents filed grievances complaining about how [Ledford] became a field agent and his salary, which led to an investigation resulting in his termination without following the ALE's internal disciplinary procedures." At that point, as ALJ Morrison explained, the burden shifted back to Ledford "to prove that [DPS's] reason for terminating [Ledford] as it did was merely a pretext, and not a legitimate, nondiscriminatory reason."

ALJ Morrison concluded that Ledford had met his ultimate burden of proving by a preponderance of the evidence that the purportedly legitimate reasons DPS had given to justify terminating Ledford were a pretext for political discrimination. In support of this conclusion, ALJ Morrison explained that in addition to relying on Ledford's *prima facie* evidence, "it did not seem credible that [DPS's] action was not politically motivated," given that Ledford

> had been performing very well as a field agent. His background, training, and experience qualified him very well for the [A]dvanced-level position and approved salary. It is more likely than not that had he not been such a prominent, life-long Democrat from Madison County he would not have been terminated, for the State needs such well-qualified ALE Special Agents.
>
> Terminating [Ledford] in disregard of ALE's internal disciplinary policy and past practices with other agents indicates that it is more likely than not that political affiliation

> was a factor. [DPS's] primary concern appeared to be to reverse the decision by Secretary Young to demote/transfer [Ledford], with no regard to how he was performing his duties as a field agent and without exploring fairly all alternatives to termination. Secretary Young had exercised due diligence prior to deciding to demote/transfer/reassign [Ledford] who was at the time a policymaking employee whose consent was unnecessary.

Based on these conclusions, ALJ Morrison ordered that Ledford be reinstated to his position as an Advanced-level Special Agent in the Asheville ALE office at his previous salary rate and paid all compensation he otherwise would have been entitled to receive since the date of his dismissal, plus attorney fees and costs.

On 30 January 2014, DPS filed a petition for judicial review in Madison County Superior Court pursuant to section 150B-43 of our General Statutes. After a hearing held on 1 December 2014, the court entered an order on 29 December 2014 affirming ALJ Morrison's Final Decision. On 30 January 2015, DPS filed notice of appeal to this Court.

Analysis

DPS argues that ALJ Morrison erred as a matter of law in concluding that Ledford's termination resulted from political affiliation discrimination. We disagree.

Standard of Review

Section 150B-51 of our State's Administrative Procedure Act ("APA") establishes the standard of review we apply when reviewing an ALJ's Final Decision and provides that while this Court may affirm or remand such a decision for further proceedings, we may only reverse or modify such a decision

> if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or [ALJ];
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;

> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2015). Our Supreme Court has observed that the first four grounds enumerated under this section "may be characterized as law-based inquiries," whereas the final two grounds "may be characterized as fact-based inquiries." *N.C. Dep't of Envtl. & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (citations and internal quotation marks omitted). Moreover, "[i]t is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as the sufficiency of the evidence to support [an ALJ's] decision are reviewed under the whole record test." *Id.* (citation, internal quotation marks, and certain brackets omitted).

Under the *de novo* standard of review, the Court "considers the matter anew and freely substitutes its own judgment. . . ." *Id.* at 660, 599 S.E.2d at 895 (citation, internal quotation marks, and brackets omitted). However, our Supreme Court has made clear that even under our *de novo* standard, a court reviewing a question of law in a contested case is without authority to make new findings of fact. *See id.* at 662, 599 S.E.2d at 896 ("In a contested case under the APA, as in a legal proceeding initiated in District or Superior Court, there is but one fact-finding hearing of record when witness demeanor may be directly observed. Thus, the ALJ who conducts a contested case hearing possesses those institutional advantages that make it appropriate for a reviewing court to defer to his or her findings of fact.") (citations and internal quotations marks omitted). Under the whole record test, the reviewing court "may not substitute its judgment for the [ALJ's] as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Id.* at 660, 599 S.E.2d at 895 (citation omitted). Instead, we must examine "all the record evidence—that which detracts from the [ALJ's] findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the [ALJ's] decision." *Id.* Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Id.* (citations omitted). We undertake this review with a high degree of deference because it is well established that

> [i]n an administrative proceeding, it is the prerogative and duty of [the ALJ], once all the evidence has been presented

> and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or part the testimony of any witness.

City of Rockingham v. N.C. Dep't of Envtl. & Natural Res., Div. of Water Quality, 224 N.C. App. 228, 239, 736 S.E.2d 764, 771 (2012).

Background Law

The sole issue before ALJ Morrison was whether Ledford was improperly terminated from his position as an ALE Advanced-level Special Agent due to illegal discrimination based on his political affiliation. On issues of employment discrimination, North Carolina courts look to federal law for guidance. *See N.C. Dep't of Corr. v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983). Our Supreme Court has adopted the same three-pronged burden-shifting approach that the United States Supreme Court uses for proving discrimination:

> (1) The claimant carries the initial burden of establishing a *prima facie* case of discrimination.
>
> (2) The burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the [adverse action affecting the employee].
>
> (3) If a legitimate nondiscriminatory reason for [the adverse action] has been articulated, the claimant has the opportunity to show that the stated reason for [the adverse action] was, in fact, a pretext for discrimination.

Id. at 137, 301 S.E.2d at 82 (citing *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973)). As our Supreme Court observed in *Gibson*, "[t]he burden of establishing a *prima facie* case of discrimination is not onerous" and "may be established in various ways," including a showing of dissimilar treatment of the claimant as compared to other employees. *Gibson*, 308 N.C. at 137, 301 S.E.2d at 82-83 (citations omitted). This is because

> [t]he showing of a *prima facie* case is not equivalent to a finding of discrimination. Rather, it is proof of actions taken by the employer from which a court may infer discriminatory intent or design because experience has

> proven that in the absence of an explanation, it is more likely than not that the employer's actions were based upon discriminatory considerations.

Id. at 138, 301 S.E.2d at 83 (citations omitted).

If the employee succeeds in establishing a *prima facie* case for political affiliation discrimination, "the employer has the burden of *producing* evidence to rebut the presumption of discrimination raised by the *prima facie* case." *Id.* (citations omitted; emphasis in original). "To rebut the presumption of discrimination, the employer must clearly explain by admissible evidence, the nondiscriminatory reasons for the employee's rejection or discharge." *Id.* at 139, 301 S.E.2d at 84. If the employer succeeds on this second prong, the burden then shifts back to the employee, who is "given the opportunity to show that the employer's stated reasons are in fact a pretext for intentional discrimination." *Id.*

Burden-shifting Prong 1: Ledford's prima facie case

First element: non-policymaking position

[1] DPS argues first that ALJ Morrison's Final Decision must be reversed because Ledford failed to establish a *prima facie* case of political affiliation discrimination given that he obtained his position as an Advanced-level Special Agent through "purely political machinations, and not through any competitive selective process." We disagree.

This Court has explained that to meet the initial burden of establishing a *prima facie* case for political affiliation discrimination, an employee must show that:

> (1) the employee work[ed] for a public agency in a non-policymaking position (i.e., a position that does not require a particular political affiliation), (2) the employee had an affiliation with a certain political party, and (3) the employee's political affiliation was the cause behind, or motivating factor for, the . . . adverse employment action.

Curtis v. N.C. Dep't of Transp., 140 N.C. App. 475, 479, 537 S.E.2d 498, 501-02 (2000).

The gravamen of DPS's argument on this point appears to be that Ledford cannot satisfy the first element required to meet his *prima facie* case. However, DPS cites no authority to support its implicit premise that the purportedly improper manner in which DPS alleges Ledford was reassigned to his position as an Advanced-level Special Agent in

ALE's Asheville office somehow precludes him from qualifying as having "work[ed] for a public agency in a non-policymaking position (i.e., a position that does not require a particular political affiliation)[.]" *Id.* at 479, 537 S.E.2d at 501. While this argument is certainly relevant to the second and third prongs of the burden-shifting analysis our Supreme Court articulated in *Gibson*, we are wholly unpersuaded it has any bearing on this specific issue. Moreover, our General Statutes define an exempt policymaking position as a position

> delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division, so that a loyalty to the Governor or other elected department head in their respective offices is reasonably necessary to implement the policies of their offices.

N.C. Gen. Stat. § 126-5(b)(3) (2015). Although Ledford's prior position as ALE Director certainly fits these criteria, the record is devoid of any evidence that "loyalty to the Governor" is a required attribute of the ALE Special Agent position from which Ledford was terminated, or that Ledford had any authority to "impose the final decision as to a settled course of action to be followed within [ALE]" while serving in that role. *See id.*; *see also Curtis*, 140 N.C. App. at 479, 537 S.E.2d at 502 (finding the petitioner satisfied the first element of his *prima facie* case by demonstrating his job in the Department of Motor Vehicles Enforcement Section "is not a policymaking position for which a particular political affiliation may be required"). Consequently, we find DPS's argument on this issue to be without merit, and we conclude that Ledford worked for a public agency in a non-policymaking position at the time of his termination.

Third element: causation[7]

[3] DPS argues next that Ledford failed to establish the third required element of his *prima facie* case because there is no competent evidence in the record to support any inference that Ledford's termination was politically motivated. Specifically, DPS complains that Gross's testimony about the phone call he received from Republican State Senator

7. **[2]** We note here that DPS does not challenge whether Ledford met the second required element of his *prima facie* case. Because the record includes substantial evidence of Ledford's affiliation with the Democratic party, *see Curtis*, 140 N.C. App. at 479, 537 S.E.2d at 502, we conclude that Ledford did satisfy this element.

Apodaca, and about incoming-DPS Secretary Shanahan's reaction to that call, was the only evidence that could support an inference of political motivation, but that this testimony should have been excluded as inadmissible hearsay. We are not persuaded.

Hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2015). Our State's APA provides that in all contested cases, "[e]xcept as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under the rules to show relevant facts, then the most reliable and substantial evidence shall be admitted." N.C. Gen. Stat. § 150B-29(a). Title 26, Chapter 3 of the North Carolina Administrative Code governs the procedures to be followed during OAH hearings and provides that an ALJ "may admit all evidence that has probative value." 26 N.C.A.C. 03 .0122 (1) (2015).

In the present case, as noted *supra*, during the OAH hearing, Gross testified over DPS's hearsay objection that Apodaca told him Ledford's reassignment "shouldn't have occurred and that they're going to fix that if they even have to just get rid of the position in the budget," and that Shanahan had agreed that the reassignment "really shouldn't have happened." When DPS objected that Gross's testimony was hearsay offered to prove the truth of the matter asserted, ALJ Morrison correctly noted that the OAH rules "provide that an ALJ can admit any evidence that has probative value and determine what weight to give it" before he admitted Gross's challenged testimony.

Given that Ledford was not offering the statements by Apodaca and Shanahan to prove the truth of the matters they asserted—that is, that his reassignment was wrong and should not have occurred—but instead to show their existing mental states and motives, we are unpersuaded by DPS's argument that Gross's challenged testimony should have been barred as hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 803(3). Further, even assuming *arguendo* these statements were hearsay, our General Assembly, through the Administrative Code, has entrusted ALJs with broad discretion to admit probative evidence during administrative hearings, and we do not view ALJ Morrison's decision to admit Gross's challenged testimony as an abuse thereof. Indeed, Gross's challenged testimony is highly probative of Ledford's *prima facie* case, insofar as it tends to show that even before Murga and Dugdale began their disciplinary investigation into Ledford's reassignment, a prominent Republican lawmaker from Ledford's part of the State voiced his displeasure that

Ledford had been reassigned to a non-policymaking exempt position and planned to take action, if necessary through the budget process, to eliminate Ledford's new position. The challenged testimony also tends to show that Shanahan, the top political appointee assigned by the McCrory Administration to run DPS, was aware of the partisan backlash to Ledford's reassignment and agreed the reassignment should not have occurred.[8]

[4] DPS argues that even if Gross's challenged testimony should not have been barred as hearsay, it still should have been excluded as irrelevant and prejudicial. Under Rule 401 of the North Carolina Rules of Evidence, evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. However, evidence that is not relevant is inadmissible, *see* N.C. Gen. Stat. § 8C-1, Rule 402, and even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403. Here, while conceding that "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision" can constitute direct evidence of discrimination, *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 284-85 (4th Cir. 2004), *abrogation on other grounds recognized by Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243 (4th Cir. 2015), DPS insists that Gross's challenged testimony was irrelevant because the statements by Apodaca and Shanahan in late 2012 were stray or isolated remarks unrelated to showing Perry's motivations for terminating Ledford in April 2013, and were also prejudicial because they represented the only evidence that could support ALJ Morrison's determinations that Ledford "was a marked man politically" and that his termination was politically motivated.

In support of this argument, DPS relies primarily on Perry's testimony during the OAH hearing that the decision to terminate Ledford was his alone, and that he did not consult with Apodaca, Shanahan, or anyone other than Murga and Dugdale in reaching that decision. However, the record in this case also includes evidence that Shanahan treated the matter of Ledford's reassignment as something of a priority, given that

8. The challenged testimony also is highly probative of another element necessary to Ledford's claim, discussed *infra*, that the purportedly nondiscriminatory reason articulated by DPS for his termination was pretextual.

he inquired about reassignments early on in the transition process and subsequently considered Ledford's termination important enough to advise the Governor's Chief of Staff about in a late-night email. Moreover, as discussed in greater detail *infra*, our review of the record, including Perry's testimony under cross-examination, reveals that Ledford's counsel raised serious doubts about the process through which Perry reached his decision to terminate Ledford, as well as the credibility of the purportedly legitimate nondiscriminatory reasons Perry and other DPS witnesses articulated for Ledford's termination. To the extent the evidence in the record and testimony during the OAH hearing supports conflicting inferences, it is well established that it is the ALJ's prerogative and duty "to determine the weight and sufficiency of the evidence" and "the credibility of witnesses and the probative value" of their testimony. *City of Rockingham*, 224 N.C. App. at 239, 736 S.E.2d at 771.

Furthermore, although DPS's argument that the probative value of Gross's challenged testimony was far outweighed by its potentially prejudicial impact focuses intensely on the last three sentences of a lengthy paragraph in which ALJ Morrison determined that Ledford had satisfied his *prima facie* burden, we note here that the very same paragraph of the Final Decision identifies several additional bases beyond Gross's challenged testimony to support this legal conclusion. Indeed, as ALJ Morrison explained, the evidence in the record and the testimony introduced during the OAH hearing tended to show that DPS: (a) never sought input from any of the decision-makers behind Ledford's reassignment in 2012 during its investigation into and decision to terminate his employment; (b) failed to follow ALE's internal disciplinary policy and therefore DPS "treated [Ledford] differently than other ALE Special Agents" by failing to provide him with notice that he was being investigated or any opportunity to respond to the charges against him; (c) ignored "suggestions from personnel and legal professionals to let the matter rest or transfer the position with [Ledford] back to Wilmington;" and (d) "focused upon holding [Ledford] responsible for actions by his Democrat[ic] superiors in late 2012 and terminat[ed] him without regard [for] the very good job he was doing as a field agent in 2013."

As discussed *infra*, DPS argues that these additional bases were insufficient to rebut the legitimate nondiscriminatory reasons it articulated to justify Ledford's termination under the second prong of the burden-shifting analysis established by *Gibson*. However, the issue immediately before us is whether Ledford established a *prima facie* case for political affiliation discrimination. Our Supreme Court has made clear that this is not an onerous burden, given that it only requires

"proof of actions taken by the employer from which a court may infer discriminatory intent or design because experience has proven that in the absence of an explanation, it is more likely than not that the employer's actions were based upon discriminatory considerations." *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83. In summation, we conclude Gross's challenged testimony was highly probative and that, in light of the additional bases articulated in ALJ Morrison's Final Decision, its probative value was not substantially outweighed by the danger of unfair prejudice. Accordingly, we hold that ALJ Morrison did not err in admitting Gross's challenged testimony or in concluding that Ledford established a *prima facie* case for political affiliation discrimination.

Burden-shifting Prong 3: Pretext

[5] DPS argues next that ALJ Morrison erred in concluding that Ledford proved the legitimate nondiscriminatory reason DPS articulated for Ledford's termination was merely a pretext for political affiliation discrimination. We disagree.

Our case law makes clear that once the employee has satisfied the three elements of his *prima facie* case, the burden shifts to the employer to articulate some nondiscriminatory reason for taking adverse action against him. *Curtis*, 140 N.C. App. at 481, 537 S.E.2d at 503. The employer's explanation "must be legally sufficient to support a judgment" in its favor. *Gibson*, 308 N.C. at 139, 301 S.E.2d at 84. In addressing the employer's purported nondiscriminatory reason,

> [t]he trier of fact is not at liberty to review the soundness or reasonableness of an employer's business judgment when it considers whether alleged disparate treatment is a pretext for discrimination.
>
> . . . .
>
> While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason must be reasonably articulated and nondiscriminatory, but does not have to be a reason that the judge or jurors would act upon or approve. . . .
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> * * *
>
> The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The

> more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one. . . .

Id. at 140, 301 S.E.2d at 84 (citation omitted). Once the employer meets its burden of production, "the burden then shift[s] back to [the employee] to prove [the employer's] alleged reason was in fact pretextual." *Curtis*, 140 N.C. App. at 481, 537 S.E.2d at 503. To carry this burden, it is permissible for the employee to rely on evidence offered to establish his *prima facie* case. *Gibson*, 308 N.C. at 139, 301 S.E.2d at 84.

In the present case, DPS argued during the OAH hearing and in its brief to this Court that it terminated Ledford for the legitimate nondiscriminatory reasons articulated in the Perry Memo. Specifically, DPS contends that Ledford improperly exploited his power as a policymaking exempt political appointee to circumvent the State Personnel Act's requirements and reassign himself; that Ledford's new position was transferred without approval from OSP back to Ledford's hometown without any legitimate business need; that the position should have been posted internally for competitive applications and the fact that it was not violated the promotional rights of the ALE Special Agents Ledford once supervised; that Ledford's salary in his new position was excessive and created an unwarranted salary inequity within ALE; and that there was no legal precedent or lawful authority to allow for Ledford's reassignment. Nevertheless, ALJ Morrison concluded that Ledford had met his ultimate burden of proving by a preponderance of the evidence that the reasons DPS articulated for his termination were merely a pretext. DPS argues this conclusion was erroneous because the only direct evidence that Ledford's termination was politically motivated came from Gross's challenged testimony and further complains that even if properly admitted, the statements by Apodaca and Shanahan, standing alone, were insufficient to rebut the legitimate nondiscriminatory reasons DPS articulated for Ledford's termination. In support of this argument, DPS relies on this Court's decision in *Enoch v. Alamance Cty. Dep't of Soc. Servs.*, 164 N.C. App. 233, 595 S.E.2d 744 (2004).

In *Enoch*, the plaintiff was a female African American DSS employee who alleged that she had been denied a promotion on two occasions due to race- and gender-based discrimination. 164 N.C. App. at 235, 595 S.E.2d at 747. In 1999, the plaintiff applied for the position of DSS program manager but was passed over in favor of a white female who did not meet the minimum qualifications for the position. *Id.* at 235, 595 S.E.2d at 748. When the plaintiff alleged during a subsequent meeting with DSS's then-director, Mr. Inman, that race had played a role in his decision to hire

the less-qualified white applicant, he replied: "You people always tend to want to believe that there's some race involved, there was no—that there's discrimination involved. There was no race involved in this decision." *Id.* at 236, 595 S.E.2d at 748. Inman later sent a letter to the plaintiff explaining his decision in greater detail, then retired at the end of the year. *See id.* The plaintiff did not appeal this decision any further, and in December 2000, she was one of three applicants for a newly created program management position. *See id.* DSS's new director, Ms. Osborne, reviewed their applications, determined that all three applicants met the minimum qualifications, and "considered a number of factors in making her selection," including a structured interview, prior work evaluations, input from the management team and each applicant's subordinates about their interactions, consultation with human resources, and the experience and educational backgrounds of each applicant. *Id.* In addition, Ms. Osborne considered a list of desired qualities including "that of a visionary who is progressive and flexible." *Id.* at 244, 595 S.E.2d at 753. In 2001, when Osborne chose a white male applicant for the promotion, the plaintiff filed a petition for a contested case hearing with OAH. *Id.* at 241, 595 S.E.2d at 751. The ALJ assigned to the matter held a three-day hearing and ultimately determined based on 110 findings of fact and 86 conclusions of law that the decision not to promote the plaintiff was made without discrimination. *See id.*

On appeal to this Court, the plaintiff challenged the ALJ's conclusion of law that DSS had successfully rebutted the presumption of discrimination by articulating a legitimate nondiscriminatory reason under the second prong of the *Gibson* burden-shifting analysis. *Id.* at 243, 595 S.E.2d at 752. We rejected that argument, explaining that Osborne had articulated several desired qualities for the position and that there was sufficient evidence introduced during the OAH hearing that the plaintiff possessed fewer of these attributes than the other applicants. *Id.* at 244, 595 S.E.2d at 753. The plaintiff also argued that the ALJ erred in concluding she had failed to show that DSS's purported nondiscriminatory reason for not promoting her in 2000 was merely pretextual. *Id.* at 245, 595 S.E.2d at 753. Specifically, the plaintiff argued that the ALJ had failed to consider the racial animus evidenced in the above-quoted remark Inman made when explaining why he passed her over for a promotion in 1999. *Id.* at 245-46, 595 S.E.2d at 754. We rejected that argument as well, explaining that the plaintiff

> offered no evidence linking the alleged prejudice of Mr. Inman to the decision of Ms. Osborne. Thus, . . . the ALJ was correct in concluding that the evidence surrounding

> the 1999 passing over of [the plaintiff] lacked sufficient probative value for inferring pretext in Ms. Osborne's nondiscriminatory reasons for hiring [the white male applicant in 2001]. Ms. Osborne was not employed by . . . DSS at the time of Mr. Inman's 1999 decision to promote [the white female applicant]; Mr. Inman was not employed by DSS at the time of Ms. Osborne's decision to promote [the white male applicant]. Furthermore, Ms. Osborne had supervised [the plaintiff] for the years of 1996-98. At no time did [the plaintiff] allege that Ms. Osborne was discriminatory in her evaluations, and these evaluations were used by Ms. Osborne in her 2001 hiring decision. Based upon the evidence before the ALJ, any inference of prejudice surrounding the 1999 promotion did not extend to Ms. Osborne's 2001 decision.

Id. at 246, 595 S.E.2d at 754. In the present case, DPS argues that just as Inman's purportedly discriminatory remark in 1999 was insufficient standing alone to rebut the legitimate nondiscriminatory reasons DSS articulated for its 2001 hiring decision in *Enoch*, Gross's challenged testimony about statements by Apodaca and Shanahan was insufficient to show that DPS's purportedly legitimate nondiscriminatory reasons for terminating Ledford four months later as articulated in the Perry Memo and during the OAH hearing were merely a pretext for political affiliation discrimination. However, this argument misconstrues our holding in *Enoch*. The *Enoch* decision was based not only on the fact that the statement by Inman upon which the plaintiff relied in her attempt to prove pretext was made two years before the challenged hiring decision by Osborne, but also, more significantly, because there was ample evidence in the record from the OAH hearing that demonstrated the multiple nondiscriminatory criteria on which Osborne based her decision to promote another applicant. *See id.* DPS's argument presupposes that here, as in *Enoch*, there was no other evidence apart from Gross's challenged testimony to support ALJ Morrison's conclusion that Ledford satisfied the third prong of the *Gibson* burden-shifting analysis. Our review of the record reveals that DPS's reliance on *Enoch* is misplaced.

During the three-day OAH hearing herein, ALJ Morrison heard extensive testimony from Ledford and other current and former DPS and ALE officials involved in the decision to reassign him regarding the process they followed, as well as testimony from those responsible for DPS's subsequent disciplinary investigation and from Gross himself about the rationale for terminating Ledford. We reiterate here that "it is

the prerogative and duty of [the ALJ], once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *City of Rockingham*, 224 N.C. App. at 239, 736 S.E.2d at 771. "The credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or part the testimony of any witness." *Id.* ALJ Morrison's Final Decision makes clear that after carefully weighing the credibility and the probative value of particular testimony, he concluded that the purportedly legitimate nondiscriminatory reasons DPS offered for Ledford's termination were not credible and, instead, were just a pretext. Given how rapidly the Perry Memo's rationales unraveled during the OAH hearing, we find ample support for ALJ Morrison's conclusion.

At the OAH hearing and in its brief to this Court, DPS repeatedly emphasized the Perry Memo's conclusion that Ledford reassigned himself. While this allegation certainly makes for an incriminating sound bite, we find it highly misleading, given that the evidence in the record tends to show that Ledford was minimally involved in the decision-making process after he raised his reassignment request with Secretary Young, who testified that he approved the request after consultation with other DPS and ALE officials including Gross, Senter, and Ragdale. The only specific evidence to the contrary that Perry could offer when he testified was that Ledford had made the request himself and also signed his PAC Form on the line designated for the Director of ALE. However, Ledford explained during his testimony that it was his regular duty to sign ALE employee PAC Forms in order to verify that their most recent performance evaluations were consistent with the actions recommended, and that he signed his own PAC Form to ensure that every individual who needed to review the propriety of his requested reassignment had the opportunity to do so. Although the Perry Memo alleges that by signing his own PAC Form, Ledford "sen[t] a clear message that neither [HR] nor Fiscal had any real authority to deny [his] request" and thus effectively exploited his position to intimidate others into complying with his wishes, DPS presented no evidence during the OAH hearing to support this allegation. Indeed, those involved in the process of approving Ledford's reassignment testified to the contrary, while Murga, Dugdale, and Perry himself acknowledged that they made no efforts whatsoever to contact any of those individuals during their investigation—despite the fact that at least two of them, Page and Senter, continued to work for ALE and presumably could have shed at least some light on the internal process that led to Ledford's reassignment. This lack of communication

may very well explain why nobody involved in DPS's investigation knew that there had indeed been a legitimate reason to move Ledford's new position to Asheville, or that Cobb had approved Ledford's reassignment on behalf of OSP in 2012, or that Gross had taken on an expanded role in the Division's chain of command.

DPS also contended that Ledford's salary in his new position was excessive and created a division-wide inequity. While there is some evidence that Gross was mistaken in his belief that Section 4, Page 29 of the State Human Resources Manual *required* Ledford's salary to be set at the maximum rate available, the plain language of this policy clearly establishes that Ledford's salary was in the legally permissible range. Moreover, Shanahan determined that the allegations of a division-wide salary inequity in the two grievances filed against Ledford were non-grievable issues, and DPS points to no evidence that Gross was mistaken when he testified that "in order for there to be a grievable inequity, there has to be more than $10,000 between the person who is at top pay and the next person below him," which was not the case here.

In addition, DPS highlighted the Perry Memo's determination that there was no legitimate business reason to relocate Ledford's new position from Wilmington to Asheville or to reclassify it from Contributing-level to Advanced-level. However, testimony introduced during the OAH hearing from Gross, Senter, Page, and Ragdale regarding the 2010 assessment that found a need for an additional Special Agent in Asheville flatly contradicts this assertion, as does evidence that even after Ledford's termination, an additional Special Agent remained in Asheville despite the Perry Memo's statement that the position would be moved back to Wilmington.

DPS also insisted that Ledford's new position should have been posted internally for competitive applications, based on testimony from Murga, Dugdale, and others who did not believe the exception to the general posting requirement Gross had identified from Section 2, Page 21 of the State Personnel Manual applied to Ledford.[9] But such a determination does not necessarily support DPS's claim that Ledford's

9. The relevant subsection here is labeled "Posting Requirements Not Applicable" and provides that: "Posting is not required when an agency determines that it will not openly recruit. The decision shall be based upon a *bona fide* business need and is the responsibility of the agency head. Examples include vacancies which are: committed to a budget reduction; used to avoid a reduction in force; used to effect a disciplinary transfer or demotion; to be filled by transfer of an employee to avoid the threat of bodily harm; to be filled immediately to prevent work stoppage in constant demand situations, or to protect public health, safety or security; designated exempt policymaking [G.S. 126-5(d)];

reassignment violated the promotional rights of other ALE agents, especially in light of the fact Shanahan rejected both grievances filed against Ledford based in part on his determination that ALE "does not afford employees a right to file a grievance for failing to post a vacant position" and that the Special Agents who complained that Ledford's reassignment without posting violated their promotional rights had not raised grievable issues because they could not show that the failure to post "arguably resulted in [each grievant's] being denied a promotion." Indeed, in light of Ledford's decades of experience, thousands of hours of advanced training, and demonstrated loyalty to ALE, we find it hard to imagine how an applicant could be more qualified to serve as an Advanced-level Special Agent, and despite its repeated claims that there was no legal precedent or lawful authority to allow for Ledford's reassignment, DPS has failed to identify any law or regulation that might expressly prohibit it. Moreover, although Section 2, Page 21 of the State Personnel Manual does not purport to provide an exclusive list of exceptions from the general posting requirement, even assuming *arguendo* the position should have been posted, Davis-Gore reviewed Murga's investigation and concluded that DPS had "two viable options" for handling this situation—namely, doing nothing or affording Ledford the opportunity to transfer with the position to Wilmington. Terminating Ledford was not among the options.

DPS complains that ALJ Morrison erred in identifying Perry's failure to follow Davis-Gore's recommendations as an additional basis to support his conclusion that the legitimate nondiscriminatory reason for terminating Ledford was merely a pretext. In DPS's view, this was wholly irrelevant and DPS raises similar objections to ALJ Morrison's focus in his Final Decision on the fact that, contrary to ALE's internal disciplinary procedure, Ledford was never provided any notice of the charges against him or any opportunity to respond, as well as the fact that neither Murga nor Dugdale nor Perry ever made any attempt to consult anyone involved in the decision-making process that resulted in

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to be filled by chief deputies and chief administrative assistants to elected or appointed agency heads[,] and vacancies for positions to be filled by confidential assistants and confidential secretaries to elected or appointed agency heads, chief deputies, or chief administrative assistants; to be filled by an eligible exempt employee who has been removed from an exempt position and is being placed back in a position subject to all provisions of the State Personnel Act; to be filled by a legally binding settlement agreement; to be filled in accordance with a formal, pre-existing written agency workforce plan, including lateral appointments resulting from the successful completion of the requirements for the Model Co-op Education Program, the In-Roads Program or the Governor's Public Management Fellowship Program; to be filled immediately because of a widespread outbreak of a serious communicable disease, and; to be filled as a result of a redeployment assignment."

Ledford's reassignment. DPS contends that the Final Decision's findings and conclusions on these points "merely serve[] to illustrate the ALJ's misunderstanding that as a non-career State employee, Ledford could be dismissed for any reason or no reason at all, just not an illegal reason." DPS is correct that once he returned to the field, Ledford was a probationary employee and had no right to the protections provided under the State Personnel Act. In our view, however, when combined with the aforementioned flaws in its stated rationale for terminating Ledford—many of which seem to have resulted from DPS's failure to consult anyone involved in the reassignment—these decisions not to afford Ledford the same procedural rights it customarily extended to all ALE employees, and not to follow the "two viable options" recommended by its top personnel officer, strongly suggest both that DPS was looking for any reason it could find to terminate Ledford and that the purportedly legitimate nondiscriminatory reasons it articulated during the OAH hearing were merely a pretext. As noted *supra*, "[t]he reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one." *Gibson*, 308 N.C. at 140, 301 S.E.2d at 84.

During an OAH hearing, it is the ALJ's duty to determine the weight and sufficiency of the evidence and the credibility of the witnesses, whose testimony the ALJ may accept or reject in whole or in part, as well as the inferences to be drawn from the facts. *City of Rockingham*, 224 N.C. App. at 239, 736 S.E.2d at 771. In the present case, we find strong support in the record for ALJ Morrison's conclusion that Ledford proved by a preponderance of the evidence that his termination was the result of political affiliation discrimination.

[6] In its final argument, DPS warns in dire tones against the public policy ramifications of allowing ALJ Morrison's Final Decision to stand. Specifically, DPS cautions this Court that our decision in this case might open the proverbial floodgates to allow future administrations of both parties to frustrate our State's democratic ideals by entrenching partisan appointees before relinquishing power. Legal scholars have long recognized the potentially deleterious effects of such practices in other arenas. *See*, *e.g.*, Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 Fordham L. Rev. 489 (2006) (analyzing the impact on our federal judiciary). While acts of old school political patronage that turn the highest levels of State government into a revolving door through which well-connected acquaintances of those in power can gain

prestige and lucrative remuneration at the taxpayers' collective expense are perhaps more publicized, on an abstract level the prospect of the old guard embedding itself bureaucratically on its way out the door in order to stall its successors' progress strikes us as potentially being every bit as corrosive to the goal of representative self-governance. Nevertheless, on a practical level, we find it difficult to discern how this rationale applies in the case of a veteran law enforcement officer who has dedicated his entire career to serving and protecting the people of this State, wishes to continue doing so in a role that has no clear impact on effectuating either party's policy priorities, and, unlike more common stereotypical well-heeled political appointees, has no proverbial golden parachute to guarantee a comfortable landing in the private sector. If our General Assembly is truly concerned with protecting North Carolinians against such harms as DPS forewarns, it can take appropriate legislative action, but this Court declines DPS's invitation to turn Ledford into a scapegoat for all that ails our body politic.

For these reasons, ALJ Morrison's Final Decision is

AFFIRMED.

Judges STROUD and INMAN concur.

MARY PONDER, Plaintiff
v.
MARK PONDER, Defendant

No. COA15-1277

Filed 3 May 2016

Domestic Violence—protection order—renewal order—no findings of fact

Where the trial court entered a domestic violence protection order (DVPO) renewal order, which was void ab initio because the court made no findings of fact, and the defendant thereafter filed notice of appeal, the trial court had no jurisdiction to enter a subsequent Supplemental Order renewing the DVPO and order awarding attorney fees to plaintiff.

Appeal by defendant from orders entered 12 February 2015, 23 June 2015 and 23 June 2015 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 13 April 2016.

Arnold & Smith PLLC, by Kyle A. Frost and Matthew R. Arnold, for plaintiff-appellee.

Hamilton Stephens Steele + Martin, PLLC, by Amy S. Fiorenza, for defendant-appellant.

TYSON, Judge.

Mark W. Ponder ("Defendant") appeals from three orders: one renewing a previously entered domestic violence protective order for an additional two years, a second "supplementing" the order renewing the protective order, and a third ordering him to pay attorney's fees incurred by his former wife, Mary W. Ponder ("Plaintiff"). We reverse the renewal order as void *ab initio*, and vacate both the supplemental order and the order for attorney's fees for lack of jurisdiction in the trial court.

I. Background

Plaintiff and Defendant married on 26 June 2010. On 13 November 2013, Defendant filed a complaint and motion for a domestic violence protective order against Plaintiff. Both parties acknowledge in their briefs that Plaintiff also filed a complaint and motion for a domestic violence protective order against Defendant on the same day, but the motion is not included in the record. Plaintiff apparently did seek such an order, as the trial court granted a domestic violence order of protection ("the DVPO") to Plaintiff and against Defendant on 13 November 2013. The DVPO remained in effect for one year, until 13 November 2014, in compliance with N.C. Gen. Stat. § 50B-3(b).

Following the trial court's entry of the DVPO, both Plaintiff and Defendant filed a plethora of motions on a range of issues over the ensuing two years. Only the motions relevant to the issues in this appeal will be discussed.

On 22 November 2013, Defendant filed a motion pursuant to Rules 52, 59, and 60 of the North Carolina Rules of Civil Procedure, seeking to set aside the original DVPO ("Defendant's Motion"). On 17 February 2014, the court denied Defendant's Motion. On 10 April 2014, Plaintiff filed a verified motion for attorney's fees seeking to recover the fees expended in connection with responding to Defendant's Motion.

On 7 October 2014, before the DVPO had expired, Plaintiff filed a verified motion seeking to renew the DVPO against Defendant. A hearing on Plaintiff's motion to renew the original DVPO was set for 12 February 2015. At the hearing, Plaintiff and Defendant testified, and counsel for both parties presented arguments on the issue. At the conclusion of the hearing, the trial court found probable cause to renew the DVPO for a period of two years. The trial court failed to make any oral findings of fact or state any reasons to show good cause to renew the DVPO. The following colloquy occurred regarding renewal of the original DVPO:

> THE COURT: All right. I think there's cause here in regards to the renewal of the domestic violence protective order. They want the AOC form, do you guys want findings of fact as far as to be included in the renewal order or I mean, that's more directed towards you [Defendant's counsel]?
>
> [Defendant's Counsel] : Yes.
>
> THE COURT: Okay. So they require it kind of both ways and you have to do the AOC form and then we can do a second order that has some findings of fact.
>
> . . . .
>
> THE COURT: . . . What I'm doing is this, is I'm going to do the AOC form today so you can walk away with this, this is going to be the one page (inaudible) it's going to say two years with the understanding that there will be a supplemental order that will have some *additional* findings of fact that I will contact you guys on that [Plaintiff's attorney] will prepare as far as the order[.]

(emphasis supplied).

On 12 February 2015, the trial court signed an order renewing Plaintiff's DVPO against Defendant ("the DVPO Renewal Order"). The DVPO Renewal Order erroneously noted the expiration date as 11 February 2015, and purported to extend the DVPO until 11 February 2017. While the trial court concluded in the DVPO Renewal Order that good cause existed to renew the DVPO, the trial court failed to make or list any findings of fact. The space on the AOC form in which the court was to make findings of fact is left blank. Defendant gave written notice of appeal from the DVPO Renewal Order on 13 March 2015.

On 19 June 2015, the trial court granted Plaintiff's motion for attorney's fees pursuant to N.C. Gen. Stat. § 50B-3 ("Attorney's Fees Order").

The Attorney's Fees Order contained findings of fact and conclusions of law. The trial court found that Plaintiff incurred attorney's fees as a result of "the [original] DVPO, defending [Defendant's Motion] and [Plaintiff's] Motion to Renew [the original DVPO]." Defendant was ordered to pay a total of $12,000.00 to Plaintiff.

On 19 June 2015, 127 days after the DVPO Renewal Order was entered and 98 days after Defendant filed notice of appeal from that order, the trial court purported to enter a "Supplemental Order Renewing Domestic Violence Protective Order and Denying Motion to Dismiss" ("Supplemental Order"). In the Supplemental Order, the trial court made findings of fact and conclusions of law purporting to support its decision to grant Plaintiff's motion "for renewal of the DVPO for a two (2) year period beginning from the hearing date (February 12, 2015)." Pursuant to the Supplemental Order, the DVPO, which on its face had expired on 13 November 2014, was to be extended erroneously from 12 February 2015 to 12 February 2017.

Defendant gave notice of appeal from the Attorney's Fees Order and the Supplemental Order on 30 June 2015. Defendant filed a motion to consolidate the appeals, and a consent order consolidating the appeals was entered on 11 September 2015.

II. Issues

Defendant argues the trial court erred by renewing the DVPO for an additional two-year period, in contravention of the plain statutory language of N.C. Gen. Stat. § 50B-3. In the alternative, Defendant argues the trial court's findings of fact in the Supplemental Order were not sufficiently supported by competent evidence. Defendant also argues the trial court erred by ordering him to pay Plaintiff's attorney's fees pursuant to N.C. Gen. Stat. § 50B-3(a)(10).

III. Appeal from DVPO Renewal Order; Effect on Supplemental Order

Defendant argues the trial court erred by renewing the DVPO for an additional two-year period from the 12 February 2015 hearing date. Because the trial court did not possess jurisdiction to enter the Supplemental Order, and because the DVPO Renewal Order is void *ab initio*, we do not reach the merits of Defendant's arguments on this issue.

A. Standard of Review

"Whether a trial court had jurisdiction to enter an order is a question of law that we review *de novo*." *Moody v. Sears Roebuck & Co.*, 191

N.C. App. 256, 264, 664 S.E.2d 569, 575 (2008). An appellate court "has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*." *Kor Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 599 (2008) (citation omitted).

B. Analysis

The power of a trial court to enter an order or take further action in a case following the filing of a notice of appeal by a party is enumerated in N.C. Gen. Stat. § 1-294, which states in relevant part:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

N.C. Gen. Stat. § 1-294 (2015).

According to well-established North Carolina law, "once an appeal is perfected, the lower court is divested of jurisdiction." *Faulkenbury v. Teachers' & State Emps.' Ret. Sys.*, 108 N.C. App. 357, 364, 424 S.E.2d 420, 422, *disc. review denied in part*, 334 N.C. 162, 432 S.E.2d 358, *aff'd*, 335 N.C. 158, 436 S.E.2d 821 (1993) (citation omitted). "An appeal is not 'perfected' until it is docketed in the appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal, so any proceedings in the trial court after the notice of appeal are void for lack of jurisdiction." *Romulus v. Romulus*, 216 N.C. App. 28, 33, 715 S.E.2d 889, 892 (2011) (citation omitted).

Here, the trial court signed and entered the DVPO Renewal Order on 12 February 2015. The order was complete, and the trial judge intended for it to be operative, at that time. The trial judge remarked at the hearing that he would fill out the AOC form on the date of the hearing, and Plaintiff could "walk away" with that form. Defendant then filed an appeal from the DVPO Renewal Order on 13 March 2015, which divested the court of jurisdiction. *Faulkenbury*, 108 N.C. App. at 364, 424 S.E.2d at 422.

We are cognizant that the trial court contemplated, at the 12 February 2015 hearing, that a supplemental order containing findings of fact supporting its decision to renew the DVPO would be filed. However, the trial court made no oral findings of fact at the hearing, the DVPO Renewal Order itself contained no written findings of fact. The contemplated

Supplemental Order, which *did* contain the findings of fact, was not entered until months after Defendant had perfected an appeal to this Court.

It is "fundamental that a court cannot create jurisdiction where none exists." *Balawejder v. Balawejder*, 216 N.C. App. 301, 320, 721 S.E.2d 679, 690 (2011) (citing *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003)). While the trial court was technically not divested of jurisdiction until the appeal was perfected in this Court, which happened after the Supplemental Order was entered, under *Romulus*, the appeal, and thus the divestment of the trial court's jurisdiction, relates back to the date of the notice of the appeal, in this case 13 March 2015. *Romulus*, 216 N.C. App. at 33, 715 S.E.2d at 892. The findings of fact and conclusions of law contained in the Supplemental Order are not ancillary to the appeal, and the trial court did not have jurisdiction to enter them following Defendant's 13 March 2015 notice of appeal. The Supplemental Order, which was a "proceeding[] in the trial court after the notice of appeal" is "void for lack of jurisdiction." *Id.*

IV. Validity of DVPO Renewal Order

Disregarding the Supplemental Order the trial court entered at a time when it was divested of jurisdiction to enter such an order, it is apparent that the purported 12 February 2015 DVPO Renewal Order, standing alone, is void *ab initio*.

A. Standard of Review

The standard of review of a trial court's order renewing a domestic violence protective order is " 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *Comstock v. Comstock*, ___ N.C. App. ___, ___, 771 S.E.2d 602, 608-09 (2015) (citing *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations and internal quotation marks omitted).

B. Analysis

For a court to renew a protective order, a plaintiff seeking the renewal "must show good cause." *Rudder v. Rudder*, 234 N.C. App. 173, 184, 759 S.E.2d 321, 329 (2014) (citation and internal quotation marks

omitted). The plaintiff "need not show commission of an additional act of domestic violence after the entry of the original DVPO" in order to demonstrate "good cause" to renew a previously entered DVPO. N.C. Gen. Stat. § 50B-3(b); *see also Rudder*, 234 N.C. App. at 184, 759 S.E.2d at 329.

We note that the DVPO Renewal Order incorporated the original DVPO by reference, and the original DVPO did include findings of fact. While "prior acts may provide support for and be 'incorporated by reference' into orders renewing DVPOs," *Forehand v. Forehand*, ___ N.C. App. ___, 767 S.E.2d 125, 128-29 (2014), the trial court must find as fact that the prior acts are "good cause" to renew the DVPO.

In *Forehand*, the trial court made eight findings of fact supporting its conclusion that "good cause" existed to renew the original DVPO. *Forehand*, ___ N.C. App. at ___, 767 S.E.2d at 128. This Court held the fact that the findings of fact to support renewal of the DVPO "rest[ed], in large part," on acts "which [also] served as the basis for issuance of the original DVPO" in the first place was immaterial. *Id.*

The findings of fact in an original DVPO may nprovide the basis for "good cause" to renew the DVPO, but only if the trial court makes new findings of fact, at the time the renewal order is entered, to support its conclusion that the "good cause" to renew is based upon the findings in the original DVPO. Here, the trial court incorporated by reference the original DVPO, but did not find as fact that these, or any other, acts which supported the original DVPO demonstrated "good cause" to renew the DVPO.

Our review of the trial court's order is limited to whether the trial judge's findings of fact are supported by competent evidence, and whether the findings of fact in turn support the conclusion of law that there was "good cause" to renew the DVPO. N.C. Gen. Stat. § 50B-3(b); *Comstock*, ___ N.C. App. at ___, 771 S.E.2d at 608-09. Here, the trial court failed to enter *any* findings of fact in the DVPO Renewal Order, and, as such, no findings support the trial court's conclusion of law that "good cause" existed to renew the DVPO. We reverse the DVPO Renewal Order. The findings of fact which purportedly do support a finding of "good cause" are contained in an order entered after the trial court was divested of jurisdiction. We vacate the Supplemental Order.

V. Attorney's Fees

Defendant argues the trial court committed specific errors in awarding attorney's fees to Plaintiff. We do not reach the merits of Defendant's

contentions, because the trial court was without jurisdiction to enter the Attorney's Fees Order.

A. Standard of Review

As noted, we review *de novo* whether a trial court had jurisdiction to enter an order. *Moody*, 191 N.C. App. at 264, 664 S.E.2d at 575. An appellate court "has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*." *Kor Xiong*, 93 N.C. App. at 652, 668 S.E.2d at 599.

B. Analysis

The facts of this case are remarkably similar to those presented in *Balawejder v. Balawejder*, 216 N.C. App. 301, 320, 721 S.E.2d 679, 690 (2011). In *Balawejder*, the trial court entered a child custody and child support order in favor of the defendant. *Id.* at 304, 721 S.E.2d at 681. The plaintiff filed a notice of appeal from the trial court's order. *Id.* After the notice of appeal had been filed, the trial court entered an order awarding attorney's fees to the defendant "for expenses incurred during trial and in preparing the final Custody and Child Support Order." *Id.*

On appeal, the plaintiff contended the trial court committed specific errors in awarding attorney's fees to the defendant. *Id.* at 319-20, 721 S.E.2d at 690-91. In vacating the trial court's order awarding attorney's fees, this Court did not reach those substantive issues, noting:

> After [the] plaintiff filed notice of appeal . . . , the trial court was divested of jurisdiction to enter orders for attorney fees pending the completion of this appeal. . . . In *McClure* [*v. Cnty. of Jackson*, 185 N.C. App. 462, 648 S.E.2d 546 (2007)], this Court thoroughly considered the trial court's jurisdiction to enter an award of attorney fees after the notice of appeal and held that it is fundamental that a court cannot create jurisdiction where none exists. N.C. Gen. Stat. § 1-294 specifically divests the trial court of jurisdiction unless it is a matter "not affected by the judgment appealed from." When, as in the instant case, the award of attorney's fees was based upon the plaintiff being the "prevailing party" in the proceedings, the exception set forth in N.C. Gen. Stat. § 1-294 is not applicable.

Balawejder, 216 N.C. App. at 320, 721 S.E.2d at 690.

Here, the Attorney's Fees Order is affected by the judgment appealed from. The award of attorney's fees was based on three proceedings:

(1) "the [original] DVPO;" (2) "defending [Defendant's Motion];" and (3) [Plaintiff's] Motion to Renew [the original DVPO]." The Attorney's Fees Order was based, in part, on the motion to renew the DVPO, which resulted in the void *ab initio* DVPO Renewal Order. The trial court was without jurisdiction to enter the Attorney's Fees Order, as it was a matter "affected by the judgment appealed from." *Balawejder*, 216 N.C. App. at 320, 721 S.E.2d at 691. We vacate the Attorney's Fees Order.

VI. Conclusion

Following Defendant's notice of appeal from the DVPO Renewal Order, which was void *ab initio* due to the lack of any findings of fact, the trial court was without jurisdiction to enter the Supplemental Order and the Attorney's Fees Order. The DVPO Renewal Order is reversed, and the Supplemental Order and the Attorney's Fees Order are vacated.

REVERSED IN PART; VACATED IN PART.

Judges CALABRIA and HUNTER, JR. concur.

LESLIE R. SMITH, PLAINTIFF
v.
DANIEL Q. HERBIN AND OROZCO SANCHEZ, DEFENDANTS

No. COA15-1074

Filed 3 May 2016

1. Motor Vehicles—automobile accident—causation—neurological issues

Where plaintiff sued defendants for personal injuries resulting from an automobile accident, plaintiff's lay testimony that she experienced tingling and itching sensations immediately after the crash was not sufficient evidence of causation to send the case to the jury. The causes of such neurological issues are not readily understandable to the average person; furthermore, plaintiff failed to produce any evidence of the mechanics of the crash.

2. Appeal and Error—directed verdict—failure to make argument before trial court

Where the trial court entered a directed verdict in favor of defendant, who admitted that he negligently caused the automobile

collision that gave rise to the action, plaintiff waived her argument that she was entitled to nominal damages because she failed to object on this ground at trial.

Appeal by plaintiff from order entered 29 January 2015 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 10 February 2016.

Steve Bowden & Associates, by Ed Yount, for plaintiff.

Davis and Hamrick, L.L.P., by Jason L. Walters, for defendant Daniel Herbin.

Kara V. Bordman, for defendant Orozco Sanchez.

DIETZ, Judge.

Defendants Daniel Herbin and Orozco Sanchez were involved in a chain-reaction rear-end collision with Leslie Smith's car at an intersection. After the crash, Smith felt a tingling in her left arm and itching in her back. Dr. Chason Hayes later treated her left shoulder with pain injections, arthroscopic surgery, and physical therapy. Smith sued Defendants, alleging that their negligence caused the collision and her resulting personal injuries and medical expenses.

At trial, Smith introduced the deposition testimony of Dr. Hayes to show that her injuries were caused by the crash. The trial court excluded Hayes's testimony on the ground that it was impermissibly speculative and thus inadmissible as expert testimony. As a result, the court granted a directed verdict in Defendants' favor because Smith had not met her burden on the element of proximate cause.

On appeal, Smith does not challenge the exclusion of Dr. Hayes's testimony. But she argues that her own testimony that the tingling and itchy sensations occurred immediately after the crash was sufficient evidence of causation to send the case to the jury. As explained below, we disagree. Lay testimony on causation is permissible only if an average person would know that those injuries were caused by that type of trauma—for example, lay testimony is permissible to show that cuts or bruises were caused by striking a car door or steering wheel with great force. By contrast, the causes of neurological issues like the

tingling and itchiness in this case are not readily understandable to the average person.

More importantly, even if the causes of these neurological sensations properly could be the subject of lay testimony, Smith never described the mechanics of the crash in her testimony. She never explained what parts of her body were strained or stressed and never provided the jury with any other information from which it could conclude that the itching and tingling in her shoulder and back must have been caused by trauma during the crash. Accordingly, we affirm the trial court's judgment.

Facts and Procedural History

On the afternoon of 17 August 2012, Defendant Orozco Sanchez rear-ended Plaintiff Leslie Smith's car while Smith was stopped at an intersection. Seconds later, Defendant Daniel Herbin rear-ended Sanchez's car, causing it to collide with Smith's car again. When paramedics arrived at the scene, Smith told them that her left arm was tingling and her back was itchy.

Smith went to the emergency room that evening and complained that her left arm was tingling and her back was twitching. Emergency room attendants took x-rays and prescribed pain medications.

Two weeks later, Smith saw Dr. Chason Hayes to address the tingling sensation in her left arm. Dr. Hayes treated Smith's left shoulder with pain injections and physical therapy, and eventually ordered an MRI of her left shoulder. Based on the MRI results, Smith decided to undergo arthroscopic surgery on her left shoulder on 16 January 2013. After additional physical therapy, Smith last saw Dr. Hayes on 13 May 2013.

On 28 March 2014, Smith sued Defendants, alleging that they negligently caused her injuries and related medical expenses by rear-ending her car. In response to Smith's allegations, Defendant Herbin admitted that he negligently caused Sanchez's car to collide with Smith's, but denied causing Smith's injuries.

At trial, Smith produced a videotaped deposition of Dr. Hayes, in which Dr. Hayes testified that the two collisions caused Smith's back and left arm injuries. At the close of Smith's evidence, Defendants moved for a directed verdict. The trial court granted the motions, reasoning that Dr. Hayes's deposition testimony was impermissibly speculative and thus inadmissible as expert testimony on the issue of whether the two collisions proximately caused Smith's injuries. Smith timely appealed.

Analysis

I. Proximate cause

[1] On appeal, Smith does not challenge the trial court's exclusion of Dr. Hayes's testimony and, as a result, concedes that she has no expert testimony on the issue of causation at trial. But she contends that the directed verdict against her was improper because her own trial testimony concerning the tingling in her left arm and the itchy sensation in her back immediately after the collision was sufficient evidence for the jury to conclude that her personal injuries and medical expenses were caused by the two collisions. For the reasons explained below, we reject Smith's argument.

We review the grant of a motion for directed verdict *de novo*. *Denson v. Richmond Cty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003). A trial court must deny a motion for directed verdict if, viewing the evidence in the light most favorable to the non-movant, there is "more than a scintilla of evidence supporting each element of the non-movant's claim." *Id.* at 412, 583 S.E.2d at 320.

Proximate cause is an essential element of a negligence claim. *Gillikin v. Burbage*, 263 N.C. 317, 324, 139 S.E.2d 753, 759 (1965). Where an injury is "so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to [its] cause." *Id.* at 325, 139 S.E.2d at 760. But when "any layman of average intelligence and experience would know what caused the injuries complained of[,]" lay testimony on proximate cause is permissible. *Id.*

For example, expert testimony is not required to show causation when the plaintiff testified that bruises on her hip were caused when her hip hit the car door in an automobile accident. *Gillikin*, 263 N.C. at 324, 139 S.E.2d at 759. Likewise, expert testimony is not required to show causation for the death of a child when lay testimony established that the child was struck by a car and thrown violently onto the pavement. *Jordan v. Glickman*, 219 N.C. 388, 390, 14 S.E.2d 40, 42 (1941).

Smith argues that her personal injuries, which manifested after the accident as tingling in her left arm and the itchy sensation in her back, are the same as the injuries sustained in *Gillikin* and *Jordan* and could be proven by her own lay testimony that they occurred immediately after the two collisions. We disagree.

First, sensations such as tingling and itchiness are not the same as a bruise. These sensations and their neurological causes are far more complex than bruising that results when a part of the human body is struck by something. Second, and more importantly, unlike the plaintiffs in *Gillikin* and *Jordan*, Smith never produced any evidence of the direct mechanism of her injuries. In the cases in which lay testimony is permitted, it is because the mechanics of the injury are readily apparent to the average person—for example, when a car door strikes a person's hip resulting in the bruise. *Gillikin*, 263 N.C. at 325, 139 S.E.2d. at 760. Here, by contrast, Smith never described what happened to her body during the collision and, in particular, never described any stress or impact on her shoulder or back that might have permitted an average person to conclude that the accident caused her tingling or itchy sensations. Simply put, Smith's testimony was not sufficient to establish causation for her injuries and the resulting medical expenses. Accordingly, the trial court did not err in granting a directed verdict in Defendants' favor based on the failure to present any competent evidence of proximate causation.

II. Nominal damages

[2] Smith next argues that the trial court erred in entering the directed verdict because Herbin admitted that he negligently caused the collision and thus she was entitled to at least nominal damages. But Herbin admitted only that he negligently caused the accident; he did not admit that Smith suffered any injuries as a result of the accident or that his negligence caused those injuries. In any event, Smith failed to preserve this argument for appeal. When the trial court announced that it was entering a directed verdict in favor of Defendants, Smith did not object on the ground that she was entitled to nominal damages against Herbin based on his admission of liability. Had she done so, the trial court could have considered this argument with the jury still impaneled. Because Smith failed to object on this ground and obtain a ruling from the trial court when she had the opportunity, this argument is waived N.C. R. App. P. 10(a)(1).

Conclusion

We affirm the trial court's judgment.

AFFIRMED.

Judges ELMORE and STROUD concur.

STATE OF NORTH CAROLINA
v.
CONSTANCE RENEA BEDIENT, DEFENDANT

No. COA15-1011

Filed 3 May 2016

Search and Seizure—prolonged traffic stop—motion to suppress evidence—reasonable suspicion—nervous behavior—associated with known drug dealer

The trial court erred in a possession of a schedule II controlled substance case by denying defendant's motion to suppress evidence uncovered after she gave consent to search her car. The findings that defendant was engaging in nervous behavior and that she had associated with a known drug dealer were insufficient to support the conclusion that the officer had reasonable suspicion to prolong defendant's detention once the purpose of the stop had concluded.

Appeal by defendant from order entered 23 March 2015 by Judge Bradley B. Letts in Jackson County Superior Court. Heard in the Court of Appeals 22 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Benjamin J. Kull, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

GEER, Judge.

Defendant Constance Renea Bedient pled guilty to possession of a schedule II controlled substance. On appeal, defendant argues that the trial court erred in denying her motion to suppress evidence uncovered after she gave consent to search her car. She contends that the trial court erred in concluding that the investigating officer had reasonable suspicion to continue questioning her after addressing the initial purposes of the stop and in concluding that she voluntarily consented to additional questioning after the conclusion of the stop. Upon our comparison of the record to the trial court's findings of fact regarding the circumstances that gave rise to reasonable suspicion, we find only two circumstances are supported by the officer's testimony: defendant was engaging in nervous behavior and she had associated with a known drug dealer.

We hold that these circumstances are insufficient to support the conclusion that the officer had reasonable suspicion to prolong defendant's detention once the purpose of the stop had concluded. Because defendant gave consent to a search during an unlawful detention, we reverse the denial of defendant's motion to suppress.

Facts

The State's evidence at the motion to suppress hearing tended to show the following facts. At around 11:30 p.m. on 28 February 2013, Sergeant Andy Parker of the Jackson County Sheriff's Office observed defendant driving a silver Mitsubishi Gallant on Highway 107 with her high beam lights on. She failed to dim her high beams as she passed Sergeant Parker going in the opposite direction. Sergeant Parker initiated a traffic stop, and defendant pulled to the side of the road. A dashboard video camera in Sergeant Parker's patrol car recorded the subsequent stop.

When Sergeant Parker approached the driver side door, defendant immediately acknowledged she was driving with her high beams on and was doing so in response to a prior stop that evening, which resulted in a written warning for a nonworking headlight. She produced this warning for Sergeant Parker. Sergeant Parker explained to defendant that he pulled her over because high beam lights are an indicator of a drunk driver. Defendant replied she was not drunk and that the prior officer instructed her to use her high beams in lieu of the nonworking headlight.

Sergeant Parker then asked the passenger of the car to identify herself. Defendant claimed it was her daughter, and the passenger identified herself as Tabitha. Sergeant Parker later determined that her full name was Tabitha Henry, a resident of South Carolina.

After reviewing the written warning defendant had received earlier, Sergeant Parker asked defendant for her license, which took her approximately 20 seconds to locate. According to Sergeant Parker, defendant seemed nervous because she was fidgety and was reaching all over the car and in odd places such as the sun visor.

While reviewing defendant's license, Sergeant Parker realized he recognized defendant and asked where he had seen her before. She responded that they had seen each other the night before at the home of Greg Coggins, where Sergeant Parker responded to a fire. Sergeant Parker testified that he knew Mr. Coggins as the "main man" for methamphetamine in Cashiers and believed that "anybody that hangs out with Greg Coggins is on drugs." Sergeant Parker also testified that

defendant's husband, Todd Bedient, regularly called the Sheriff's Office complaining that defendant was taking up residence with Mr. Coggins.

Sergeant Parker returned to his patrol car to check on defendant's license and for any outstanding warrants on defendant or Ms. Henry. While seated in his patrol car, Sergeant Parker observed defendant moving around her car and reaching for her sun visor again. Meanwhile, the warrant checks for defendant and Ms. Henry turned up negative. Upon returning to defendant's car, Sergeant Parker requested that she join him at the rear of the car.

Sergeant Parker first cautioned defendant about driving with her high beams on and gave her a verbal warning since she had already received a written warning for her nonworking headlight. They discussed the problems with defendant's headlights for 15 to 20 seconds longer. Then, Sergeant Parker changed the subject, asking defendant when she planned to change the address on her license. Defendant claimed that she was not going to change her address. Sergeant Parker informed her that if she was not going to live at the address listed on her license, she would need to change it within 30 days or be guilty of a misdemeanor.

Only a few seconds later, Sergeant Parker changed the subject of his questioning again. He asked defendant if she had "ever been in trouble for anything." Defendant replied she had not. Sergeant Parker then asked defendant if she had anything in the car, to which she replied, "No, you can look." Sergeant Parker then handed defendant's license back to her and told defendant he was going to talk to Ms. Henry. As defendant attempted to reenter the vehicle, Sergeant Parker asked her to return to the rear of the car while he searched it. He then asked Ms. Henry to exit the car and stand by defendant.

As Sergeant Parker began searching the car he noticed an open beer bottle lodged in between the passenger seat and the center console. He confirmed that both defendant and Ms. Henry had been drinking the beer. As he continued to search the car, he discovered "crystal matter," pills, baggies, and "a folded dollar bill with some type of powdery residue in it" in a pocketbook that defendant admitted belonged to her. Sergeant Parker then placed defendant under arrest.

On 12 May 2014, defendant was indicted on one count of felony possession of a schedule II controlled substance and one count of possession of drug paraphernalia. Defendant filed a motion to suppress on 9 January 2015 that was heard on 16 March 2015 and denied in open court. The trial court later filed a written order on 23 March 2015 concluding

that reasonable suspicion supported Sergeant Parker's continued questioning of defendant after he had verbally warned her about the use of her high beams and the invalid address on her license. The order further concluded that defendant voluntarily consented to additional questioning and the search of her car once the purpose of the stop was over.

Defendant reserved her right to appeal the denial of her motion to suppress. On 17 March 2015, the day after defendant's motion was denied, defendant pled guilty to possession of a schedule II controlled substance and received a suspended sentence of five to 15 months conditioned on the completion of 12 months of supervised probation. The State dismissed the indictment for possession of drug paraphernalia in exchange for the guilty plea. Defendant timely appealed to this Court.

Discussion

On appeal, defendant contends that the trial court erred in denying her motion to suppress, arguing that Sergeant Parker unlawfully prolonged the traffic stop without having reasonable articulable suspicion to do so and, further, that her consent was invalid because it was given during this unlawful detention. We review a trial court's denial of a motion to suppress by "determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cook*e, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

A. The "Mission" of the Traffic Stop

"[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' -- to address the traffic violation that warranted the stop, and attend to related safety concerns." *Rodriguez v. United States*, ___ U.S. ___, ___, 191 L. Ed. 2d 492, 498, 135 S. Ct. 1609, 1614 (2015) (internal citations omitted). "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.' " *Id.* at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615 (quoting *Illinois v. Caballes*, 543 U.S. 405, 408, 160 L. Ed. 2d 842, 847, 125 S. Ct. 834, 837 (2005)). "Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615.

Apart from these inquiries, an officer "may conduct certain unrelated checks during an otherwise lawful traffic stop. *But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.*" *Id.* at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615 (emphasis added). Thus, absent reasonable suspicion, "[a]uthority for the seizure . . . ends when tasks tied to the traffic infraction are -- or reasonably should have been -- completed." *Id.* at ___, 191 L. Ed. 2d at 498, 135 S. Ct. at 1614.

Here, defendant does not dispute the finding that Sergeant Parker had a legitimate basis for performing a traffic stop for the purpose of addressing defendant's failure to dim her high beam lights. Addressing this infraction, according to *Rodriguez*, was the original mission of the traffic stop. Defendant also does not contest that Sergeant Parker could then legitimately run a computerized license and warrant check of defendant -- as the trial court found, the officer learned through these checks that defendant had a valid license and no pending warrants for her arrest. These two checks, considered by *Rodriguez* to be " 'ordinary inquiries incident to the stop,' " did not unlawfully prolong the stop. *Id.* at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615 (quoting *Caballes*, 543 U.S. at 408, 160 L. Ed. 2d at 847, 125 S. Ct. at 837).

The trial court's unchallenged findings indicate that Sergeant Parker then returned to defendant's car and asked defendant to exit the car and join him at the rear of the car. Although Sergeant Parker arguably prolonged the stop by requesting defendant to get out of her car, the trial court found that this was "warranted in this case for purposes of officer's safety and to address the issues Sgt. Parker determined were related to the driver's license." Defendant does not challenge this finding, and we find it comports with *Rodriguez*, because Sergeant Parker was "attend[ing] to related safety concerns" and had legitimate questions regarding the address on defendant's license. *Id.* at ___, 191 L. Ed. 2d at 498, 135 S. Ct. at 1614.

The trial court's findings then indicate that once at the rear of the car, Sergeant Parker first "provided defendant a second warning from law enforcement on the use of high beams . . . ." At this point in time, the original purpose, or mission, of the traffic stop -- addressing defendant's failure to dim her high beam lights -- had concluded because, as the trial court found, Sergeant Parker gave defendant a verbal warning, deciding not to issue defendant a traffic ticket. Sergeant Parker had also completed the related inquiries because he determined defendant's license was valid, and she had no outstanding warrants for her arrest. *Id.* at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615.

According to the trial court's findings, subsequent to this original verbal warning, Sergeant Parker asked defendant questions regarding the address on her license. These questions were reasonable because "there existed in the mind of Sgt. Parker a valid, articulable issue regarding whether her residence was with Todd Bedient or Greg Coggins" and "failure to change an address on a driver's license after a fixed number of days is a violation of N.C. Gen. Stat. §20-7.1."[1] Defendant also did not challenge this specific finding, and it is binding on appeal.

Therefore, even though the original mission of the traffic stop was completed upon Sergeant Parker's verbal warning to defendant regarding her failure to dim her high beams, the additional questioning regarding the address on her license, and thus defendant's prolonged detention, was supported by reasonable suspicion. This finding by the trial court comports with the standard in *Rodriguez* and is in accordance with prior North Carolina precedent as well. *See State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 754 (" 'Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay.' " (quoting *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998))), *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008).[2]

Because Sergeant Parker had reasonable suspicion to prolong the stop beyond the conclusion of the original mission of the traffic stop, Sergeant Parker developed a new mission for the stop: to determine whether defendant was in violation of N.C. Gen. Stat. § 20-7.1 (2015) for failure to change the address on her license. After eliciting a response from defendant regarding her address, Sergeant Parker "explained to her the concerns over the change in address on the driver's license" and "gave an additional verbal warning about maintaining the proper address on her driver's license." At that point, and pursuant to *Rodriguez*, Sergeant Parker had concluded the second mission of the stop because

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1. As noted by the trial court's order, violation of this statute was a Class 2 misdemeanor until 1 December 2013. It is now punished as an infraction. N.C. Gen. Stat. § 20-35(a2)(3) (2015). This change was implemented pursuant to 2013 N.C. Sess. Law Ch. 385, § 4. Because the traffic stop was conducted on 28 February 2013, this change has no effect on the trial court's determinations.

2. Furthermore, assuming, without deciding, that Sergeant Parker did not have reasonable suspicion to further question defendant about her address, the question could be considered an " 'ordinary inquir[y] incident to [the traffic] stop' " because Sergeant Parker was checking the accuracy of defendant's driver's license. *Rodriguez*, ___ U.S. at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615 (quoting *Caballes*, 543 U.S. at 408, 160 L. Ed. 2d at 847, 125 S. Ct. at 837).

he had determined not to issue defendant a ticket in connection with defendant's license.

As this Court recognized in *State v. Cottrell*, ___ N.C. App. ___, ___, 760 S.E.2d 274, 280 (2014), once Sergeant Parker completed both missions, he needed reasonable suspicion to prolong defendant's detention beyond the conclusion of this second mission. In *Cottrell*, this Court held that after an officer addressed the two purposes for a traffic stop -- defendant's failure to activate his headlights and defendant's loud music -- with verbal warnings, the officer "was then required to have 'defendant's consent or grounds which provide a reasonable and articulable suspicion in order to justify further delay *before*' asking defendant additional questions." *Id.* at ___, 760 S.E.2d at 279-80 (quoting *Myles*, 188 N.C. App. at 45, 654 S.E.2d at 755). *See also State v. Jackson*, 199 N.C. App. 236, 242, 243, 681 S.E.2d 492, 496, 497 (2009) (finding further detention and questioning of defendant was unreasonable seizure because it occurred " '[r]ight after the traffic stop was pretty much over,' " and "there was no evidence which could have provided [the officer] with reasonable and articulable suspicion to justify the extension of the detention").

Here, after Sergeant Parker verbally warned defendant about her failure to dim her high beams and failure to maintain the proper address on her license, the two purposes -- the two missions -- of the traffic stop were addressed. And, at that point, Sergeant Parker needed reasonable, articulable suspicion that criminal activity was afoot before he prolonged the detention by asking additional questions.

B. Reasonable Suspicion to Prolong the Stop

According to the trial court's findings of fact, "[a]t the conclusion of the interaction . . . Sgt. Parker asked the defendant 'Do you have anything in the vehicle?[,]' " to which defendant replied, " 'No. You can look.' " In support of its conclusion that "Sgt. Parker had reasonable suspicion to further question the defendant in that under the totality of the circumstances there existed specific articulable facts to indicate that criminal activity was afoot[,]" the trial court made the following findings:

> 48. . . . Sgt. Parker had reasonable articulable suspicion under the totality of the circumstances to further detain defendant. These factors consisted of observing defendant for eight minutes, finding her speech to be stuttering, defendant exhibiting fidgety actions which is consistent with use of methamphetamine, repeated fixation on the driver's side sun visor, failure

to initially provide the last name of the passenger or explain the passenger was her daughter, continued operation of the same vehicle with the same lack of headlights on the same day after receiving a warning ticket for the same failure to dim headlights and having been at a residence known by law enforcement in Jackson County to be a location of drug use and drug transactions.

. . . .

55. Additionally, at the same time consent was given there did exist reasonable articulable suspicion based upon the totality of the circumstances presented to Sgt. Parker which supported further investigation and detention of defendant.

56. In addition to the specific and articulable factors that defendant was observed for eight minutes, the speech stuttered, defendant exhibiting fidgety actions which is consistent with use of methamphetamine, defendant repeatedly manipulated the driver's side sun visor, defendant failed to initially provide the last name of the passenger or explain the passenger was her daughter, defendant continued to drive the same vehicle with the same lack of headlights on the same day after receiving a warning ticket for the same failure to dim headlights issue and was at a residence known by law enforcement in Jackson County to be a location of drug use and drug transactions, after getting consent to search the vehicle defendant then attempted to return to the vehicle thereby impeding the search of Sgt. Parker.

Defendant contends that most of the circumstances identified in these findings of fact to justify further detention are not supported by competent evidence. Based on our review of the record, we agree.

Defendant first claims that the evidence does not support the finding that defendant failed to initially explain the passenger was her daughter. After reviewing Sergeant Parker's dashboard video camera footage, it is clear that defendant identifies the passenger as her daughter in immediate response to Sergeant Parker's inquiry. This finding is, therefore, not supported by the evidence.

Defendant next challenges the description of her fidgeting as "consistent with use of methamphetamine." At the suppression hearing, Sergeant Parker testified that defendant's conduct indicated nervousness. There is no evidence suggesting that Sergeant Parker believed defendant's "fidgety actions," or other nervous behavior such as her "fixation on the driver's side sun visor" or the "extreme rapidity in her movements" were consistent with the use of methamphetamine. Thus, this finding is also unsupported.

Next, defendant argues that the trial court erroneously described the warning she received before Sergeant Parker's stop as a warning for "failure to dim high beams." As a result, she also claims the finding that defendant received the same verbal warning for the "same failure to dim headlights" is unsupported by the evidence. The dashboard video in fact evidences that defendant explained to Sergeant Parker that her original warning was for a nonworking headlight and, further, that the prior investigating officer instructed her to use her high beam lights in lieu of her nonworking headlight. Accordingly, we hold this finding regarding the warnings is unsupported by competent evidence.

Finally, defendant challenges the finding that defendant was at a residence known for drug use and transactions. Sergeant Parker's testimony indicates that he observed defendant the night before the traffic stop at the home of Greg Coggins, a man who is known in the town of Cashiers as "the main man" for methamphetamine. We hold that this testimony is sufficient to support the finding that Mr. Coggins' home was a regular location for drug use and transactions.

Accordingly, as defendant argues, the only competent findings supporting the trial court's determination that Sergeant Parker had reasonable suspicion to further question defendant are defendant's nervous behavior during the traffic stop, evidenced by her stuttering, rapid movements, and fixation with her sun visor, and her association with a drug dealer, evidenced by her presence at Greg Coggins' house the prior evening. Thus, we must determine whether these two factors establish reasonable articulable suspicion that criminal activity was afoot under the "totality of the circumstances." *Myles*, 188 N.C. App. at 45, 654 S.E.2d at 754.

" 'To determine reasonable articulable suspicion, courts view the facts through the eyes of a reasonable, cautious officer, guided by his experience and training at the time he determined to detain defendant.' " *Id.* at 47, 654 S.E.2d at 756 (quoting *State v. Bell*, 156 N.C. App. 350, 354, 576 S.E.2d 695, 698 (2003)). "In addition, '[t]he requisite degree of

suspicion must be high enough to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.' " *Cottrell*, ___ N.C. App. at ___, 760 S.E.2d at 280 (quoting *State v. Fields*, 195 N.C. App. 740, 744, 673 S.E.2d 765, 767 (2009)). Thus, "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 909, 88 S. Ct. 1868, 1883 (1968).

First, it is well settled that a defendant's nervous behavior during a traffic stop, although relevant in the context of all circumstances, is insufficient by itself to establish reasonable suspicion that criminal activity is afoot. *See, e.g.*, *State v. Pearson*, 348 N.C. 272, 276, 498 S.E.2d 599, 601 (1998) (suggesting that "[t]he nervousness of the defendant [was] not significant" to the determination of reasonable suspicion because "[m]any people become nervous when stopped by a state trooper"); *State v. Blackstock*, 165 N.C. App. 50, 58, 598 S.E.2d 412, 417-18 (2004) (holding nervousness, by itself, is not sufficient to establish reasonable suspicion). Moreover, as this Court has recognized, the nervousness needs to be "extreme" in order to "be taken into account in determining whether reasonable suspicion exists[.]" *Myles*, 188 N.C. App. at 49, 654 S.E.2d at 757. While defendant's nervousness in this case may have been substantial, it cannot, by itself, establish reasonable suspicion to extend the traffic stop.

Although those findings of the trial court supported by the evidence show that defendant stuttered her words, moved around the car rapidly, and touched the sun visor repeatedly, this nervous behavior is a common response to a traffic stop. Furthermore, we note that the sun visor is not an uncommon location to keep a motorist's driver's license or registration. Thus, defendant's fixation on the sun visor could have been in response to an attempt to locate either one of these things and does not necessarily indicate suspicious movements.

Furthermore, a person's mere association with or proximity to a suspected criminal does not support a conclusion of particularized reasonable suspicion that the person is involved in criminal activity without more competent evidence. *See State v. Washington*, 193 N.C. App. 670, 678, 668 S.E.2d 622, 627 (2008) (holding conclusion "that the officer had a right to make a brief investigatory stop of defendant *because he was transporting* [a person wanted for various felony offenses] was erroneous as a matter of law"). This circumstance is analogous to the

well settled principle that mere presence in a high-crime area, although relevant in the totality of the circumstances, is insufficient by itself to establish reasonable suspicion. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576, 120 S. Ct. 673, 676 (2000) ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."); *Blackstock*, 165 N.C. App. at 58, 598 S.E.2d at 417-18 (holding that presence in high crime area alone does not amount to reasonable suspicion).

Here, defendant's association with Greg Coggins -- specifically the fact that Sergeant Parker saw defendant over at Coggins' house, "a residence known . . . to be a location of drug use and drug transactions[,]" 24 hours prior to the stop -- is also insufficient to establish reasonable suspicion. Although Sergeant Parker testified he believes "anybody that hangs out with Greg Coggins is on drugs[,]" Sergeant Parker did not testify to any particularized suspicion that defendant was on drugs the previous night when he encountered defendant at Coggins' house. Nor did he testify that he believed defendant was on drugs at the time of the traffic stop. Thus, Sergeant Parker did not tie defendant's association with Coggins to any basis particularized to defendant for reasonably suspecting that she was, at the time of the traffic stop, engaging in criminal activity.

Considering the totality of the circumstances found by the trial court (as supported by the evidence) -- defendant's nervous behavior and association with Greg Coggins -- we find these two factors are together insufficient to amount to the reasonable suspicion necessary for Sergeant Parker to further detain defendant. The established case law in this State is consistent with that holding. For instance, in *Myles*, this Court found that the defendant's extremely nervous behavior, specifically his fast heartbeat, and the fact that his rental car was one day overdue, did not amount to reasonable suspicion. 188 N.C. App. at 47, 50, 51, 654 S.E.2d at 756, 757, 758. Similarly, in *Cottrell*, the officer's knowledge of the defendant's past criminal drug convictions and the smell of a common cover scent for marijuana did not support a finding of reasonable suspicion under the totality of the circumstances. ___ N.C. App. at ___, 760 S.E.2d at 280-81.

The Fourth Circuit has also concluded that reasonable suspicion did not exist when the only indicators of criminal activity were the facts that defendant had an odd travel itinerary, that he rented a car from a state which is a source of illegal drugs, that defendant was stopped on an interstate known for drug trafficking, and that defendant was

initially nervous. *United States v. Digiovanni*, 650 F.3d 498, 513 (4th Cir. 2011). Thus, because there was "no evidence of flight, suspicious or furtive movements, or suspicious odors, such as the smell of air fresheners, alcohol, or drugs" that would amount to suspicious behavior, the extended detention was impermissible. *Id.*

Indeed, when considering factors collectively that individually would not warrant a conclusion that reasonable articulable suspicion existed, the Fourth Circuit has directed that "the relevant facts articulated by the officers and found by the trial court, after an appropriate hearing, must in their totality serve to eliminate a substantial portion of innocent travelers." *United States v. Williams*, 808 F.3d 238, 246 (4th Cir. 2015) (internal quotation marks omitted). *See also Digiovanni*, 650 F.3d at 511 (while acknowledging that "[t]he Supreme Court has recognized that factors consistent with innocent travel can, when taken together, give rise to reasonable suspicion[,]" holding that "[t]he articulated innocent factors collectively must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied" (internal quotation marks omitted)).

Here, as in *Williams* and *Digiovanni*, defendant's nervousness when combined with the fact that she had associated with a drug dealer (who was not even present in the car) are not sufficient circumstances to eliminate a substantial portion of innocent travelers. These two circumstances simply give rise to a hunch rather than reasonable, particularized suspicion. *Compare State v. Fisher*, 219 N.C. App. 498, 504, 725 S.E.2d 40, 45 (2012) (finding reasonable suspicion given defendant's nervousness, cover scent, inconsistent answers regarding travel plans, and "driving a car not registered to the defendant"); *State v. Euceda-Valle*, 182 N.C. App. 268, 274-75, 641 S.E.2d 858, 863 (2007) (holding reasonable suspicion present given defendant's extreme nervousness, refusal to make eye contact, cover scent, and inconsistencies in defendant's and passenger's stories regarding their trip); *State v. Hernandez*, 170 N.C. App. 299, 309, 612 S.E.2d 420, 426, 426-27 (2005) (holding reasonable suspicion existed based on defendant's nervous behavior, conflicting statements, and a cover scent).

Therefore, under the totality of the circumstances here, defendant's association with Greg Coggins and nervous behavior do not amount to reasonable suspicion where there are no findings of evasive or inconsistent answers to the officer's questions, as noted in *Fisher*, *Euceda-Valle*, and *Hernandez*, no findings of flight or suspicious or furtive movements as indicated in *Digiovanni*, or any other findings suggesting that criminal

activity is afoot amounting to more than Sergeant Parker's "inchoate and unparticularized suspicion." *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909, 88 S. Ct. at 1883. Therefore, we hold that when Sergeant Parker further questioned defendant about the contents of her vehicle, he unlawfully prolonged the duration of the traffic stop.

C. Defendant's Consent

Since Sergeant Parker lacked reasonable suspicion to prolong the stop, defendant's consent to a search of her car was valid only if the extended encounter between Sergeant Parker and defendant became consensual. *See Myles*, 188 N.C. App. at 45, 654 S.E.2d at 755 (holding officer must have reasonable suspicion or defendant's consent to prolong the stop by asking additional questions). "Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration." *Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497.

Thus, defendant challenges the trial court's conclusion that "[t]he defendant voluntarily consented and agreed to additional questioning . . . once the purpose of the traffic stop was over." In challenging this conclusion, defendant contends the findings of fact underlying that conclusion are unsupported by the evidence. The trial court first found: "Contemporaneously with Sergeant Parker advising her that she would not be charged or cited for any driving offense he returned her driver's license. These events occurred simultaneously . . . ." The trial court then further found: "Contemporaneous with the return of the license, Sgt. Parker asked the defendant 'Do you have anything in the vehicle?' "

After reviewing the dashboard video, we agree with defendant that these events did not occur simultaneously or contemporaneously as the trial court's findings suggest. To the contrary, Sergeant Parker continued to possess defendant's driver's license up until the moment he received consent to search her car. He only returned defendant's driver's license upon commencing the search. Therefore, because defendant's license had not been returned at the time defendant gave her consent and because, at that time, the stop had been unlawfully extended, defendant's consent was not voluntary. The trial court's pertinent findings of fact are not supported by the evidence, which necessarily invalidates the conclusion that defendant voluntarily consented to the additional questions after the conclusion of the stop.

"Accordingly, the officer's continued detention of defendant violated defendant's Fourth Amendment right against unreasonable seizures and defendant's subsequent consent to a search of his car was

involuntary as a matter of law." *Cottrell*, ___ N.C. App. at ___, 760 S.E.2d at 285. *See also Myles*, 188 N.C. App. at 51, 654 S.E.2d at 758 ("Since [the officer's] continued detention of defendant was unconstitutional, defendant's consent to the search of his car was involuntary."). The trial court, therefore, erred in denying defendant's motion to suppress, and we reverse.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
JEFFREY CASTILLO

No. COA15-855

Filed 3 May 2016

1. Confessions and Other Incriminating Statements—traffic stop questions—no questions post arrest—Miranda not applicable

Miranda was not applicable in a drug seizure case arising from a traffic stop where defendant was questioned during the traffic stop, the questions related for the most part to the traffic stop, and he was not asked any questions after his arrest.

2. Search and Seizure—traffic stop—extended—reasonable suspicion

The trial court erred by suppressing evidence of cocaine and heroin that resulted from a traffic stop where the officer had reasonable suspicion to extend the stop based on defendant's bizarre travel plans, his extreme nervousness, the use of masking odors, the smell of marijuana on his person, and the third-party registration of the vehicle.

3. Search and Seizure—traffic stop—consent to search—voluntary

Defendant's consent to search his car following a traffic stop was voluntary and the trial court erred by suppressing evidence of cocaine and heroin. Although it appeared that the trial court believed that the officer lacked reasonable suspicion to extend the

stop, and that the unlawful extension impinged on defendant's ability to consent, the trial court misunderstood the sequence of events.

Appeal by the State from order entered 22 April 2015 by Judge Richard Allen Baddour Jr. in Durham County Superior Court. Heard in the Court of Appeals 15 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Sutton & Lindsay PLLC, by Kerstin Walker Sutton and Stephen P. Lindsay, for the defendant-appellant.

McCULLOUGH, Judge.

The State appeals from an order allowing Jeffrey Castillo's ("defendant's") motion to suppress the search of his vehicle entered by the trial court on 22 April 2015. After careful review, we reverse.

I. Background

On 26 September 2014, Officer Roy Green, a 15-year veteran Durham Police Department officer assigned to the highway interdiction division of the special operations division was parked on an exit ramp monitoring the southbound lanes of I-85 near the Durham-Orange county border. Officer Green testified that he patrols the I-85 corridor looking for people who might be using that route to move contraband, money, or engage in human trafficking while also stopping and citing routine traffic violators. Officer Green further testified that he has had specialized interdiction training beginning in 2006. The interdiction training teaches him how to look for verbal and non-verbal indicators that the person stopped for a traffic violation might also be engaged in other criminal activity.

During his shift, Officer Green positioned his vehicle, a marked unit with no roof light system, on the exit ramp of Highway 70 which provided him with a clear view of the I-85 South traffic lanes. He noticed a green car traveling at what he estimated as a high rate of speed, so the officer began to follow the car to determine how fast the car was travelling. Officer Green had tested his speedometer and radar to ensure the accuracy of his speedometer at the beginning of the shift, which was important since there was too much traffic at the location he was monitoring for him to use his radar. After pacing defendant's vehicle for enough time and distance to calculate defendant's speed as 72 mph in a 60 mph zone, Officer Green activated his emergency lights and stopped

defendant's vehicle. When defendant observed the officer's lights he abruptly pulled over to the shoulder of the road, startling Officer Green and requiring him to brake to avoid collision.

Officer Green approached defendant's vehicle from the passenger side and asked for his license and registration. Officer Green noticed defendant's hand was shaking uncontrollably as he handed the license to him. Officer Green also smelled a mild odor of air freshener emanating from the interior of the vehicle and observed that defendant was operating the vehicle with a single key, which indicated to Officer Green that defendant might not be the owner of the car. Officer Green explained that people who loan someone a car will often not give out all of their keys. This was corroborated later during the investigation as the officer validated that an individual from the Jackson Heights or Queens area of New York City was the owner of the vehicle. Upon noticing defendant's extreme nervousness, Officer Green asked defendant where he was going and where was he coming from. Instead of answering, defendant would respond with "huh," requiring Officer Green to re-ask the question. Officer Green testified that he believed this indicated defendant was stalling so that he could think of what to say. Officer Green testified he knew that defendant clearly heard the question as he had asked defendant to roll up the driver side window to screen the traffic noise from I-85 and make it quieter for their conversation. After the question was asked again, defendant informed Officer Green that he was coming from Queens, New York. Officer Green then asked defendant again about his destination and received another "huh" as his answer. Upon the second or third time defendant was asked about his destination, defendant claimed he did not know where he was going but had an address in the GPS of his phone. Defendant could not even provide the city where that address was located. Officer Green then asked if defendant had been to North Carolina before, to which defendant replied that this was his first trip.

Officer Green again asked where he was going and defendant could not, or would not, tell Officer Green his destination. At that point Officer Green concluded that defendant clearly did not want to tell him where he was going. Officer Green testified that he felt this was very strange for in 15 years of stopping people, they always knew where they were coming from and where they were going. Officer Green testified this was the first time someone ever told him that they did not know their destination, but had a destination address locked into the GPS on their phone. Officer Green testified that defendant informed him it was Big Tree Way, but he did not know the city in which this address was located; defendant

only knew it was about an hour away. Given the facts that defendant had answered his questions with "huh" repeatedly and could not, or would not, disclose his destination, Officer Green began to believe that there was criminal activity involved. This belief arose before Officer Green asked defendant to exit his vehicle, submit to a pat down for weapons, and sit in his patrol vehicle.

The patrol vehicle was outfitted with both an in-car camera system to record the inside of the patrol vehicle and a forward-facing camera system to record what the driver would see in front of the patrol vehicle. The entire video of Officer Green's interaction with defendant was entered into evidence and played for the trial court judge.

That video showed that while in the process of entering defendant's information and that of the registered owner, Officer Green asked defendant about the odor of marijuana that he now detected. Defendant answered that he had smoked about three days ago and that some of his friends smoked, and that is what Officer Green might have smelled. Then later, while the officer is still processing the defendant's name, registration, and routine information, defendant volunteered that he had been arrested for DUI in New York due to his driving while under the influence of marijuana, an experience defendant said he had learned from. While in the patrol vehicle, Officer Green also had defendant repeat his story about not knowing the city of his destination but that he had an address locked into the GPS of his phone and he was about an hour away. Officer Green then asked who defendant was going to see and defendant said "Eric." But when asked Eric's last name, defendant said he did not know. Defendant explained that he was going to see Eric, hang out for a few days, and go back to New York in the car he had borrowed from another friend. All of this occurred well before Officer Green learned from dispatch that there were no warrants for defendant.

Officer Green further testified that he had to change to the police channel in case the department was doing a safety check and then go back to dispatch to get information about warrants. Officer Green also ran the names of the owner of the vehicle and defendant through the El Paso Intelligence Center ("EPIC") before printing out a warning ticket, although Officer Green had already informed defendant that he was going to receive a warning ticket long before the ticket was actually printed.

As Officer Green handed defendant the warning ticket, Officer Green asked defendant if he had any marijuana in the car, noting that he had smelled marijuana on defendant and defendant had admitted

to the marijuana-based DUI. Defendant denied there was any marijuana in the car and said, "[y]ou can search, if you want to search." The ensuing search discovered a quantity of heroin and cocaine in a trap door under the center console. As the officers are locating the drugs, defendant is heard muttering "they found it" on the video recording.

After his arrest, defendant was indicted on 3 November 2014 and a suppression hearing was held on 20 April 2015. The trial court entered an order allowing defendant's suppression motion on 22 April 2015, from which the State now appeals. The trial court ruled that Officer Green unnecessarily extended the traffic stop without reasonable suspicion and that defendant had not given clear and unequivocal consent to search his vehicle.

II. Standard of Review

"The standard of review for a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Wainwright*, __ N.C. App. __, __, 770 S.E.2d 99, 104 (2015) (internal quotation marks and citation omitted).

Whether a defendant has voluntarily consented to a search is determined after a review of the totality of the circumstances surrounding the obtaining of consent. *State v. Smith*, 346 N.C. 794,798, 488 S.E.2d 210, 213 (1997). Consent in the context of searches and seizures "means a statement to the officer, made voluntarily and in accordance with the requirements of [N.C. Gen. Stat. §] 15A-222, giving the officer permission to make a search." N.C. Gen. Stat. § 15A-221(b) (2015).

III. Analysis

Here, the trial court properly found that Officer Roy Green, a 15-year veteran of the Durham Police Department serving in the interdiction unit of the special operations division, stopped a vehicle driven by defendant with reasonable suspicion that defendant was speeding in violation of N.C. Gen. Stat. § 20-141. The validity of the initial traffic stop is not at issue in this case. The problem with the trial court's order stems from a misunderstanding of the United States Supreme Court's recent decision in *Rodriguez v. United States*, __ U.S. __, 191 L. Ed. 2d 492 (2015), which held that even a *de minimis* extension of a valid traffic stop is a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures absent reasonable suspicion. Understanding exactly what *Rodriguez* permits and what *Rodriguez* prohibits is important. Thus, we re-visit the facts of *Rodriguez* and the legal standards applied in the Eighth Circuit at the time of the *Rodriguez* traffic stop.

In *Rodriguez*, a canine police officer, who had his dog with him in his patrol vehicle, stopped a vehicle after observing it veer slowly onto the shoulder of the road and then "jerk" back onto the road. *Id.* at __, 191 L. Ed. 2d at 1612. The defendant in *Rodriguez* was driving the vehicle and there was a passenger in the front passenger seat. *Id.* Upon approaching the passenger side of the vehicle, the officer inquired why the defendant had driven onto the shoulder and the defendant replied that he had swerved to avoid a pothole. *Id.* at __, 191 L. Ed. 2d at 1613. Resolving the separate issue of whether the officer had reasonable suspicion to extend the traffic stop, an issue the majority did not reach and sent back for consideration by the Eighth Circuit, Justice Thomas added that "[the defendant's] story could not be squared with [the officer's] observation of the vehicle slowly driving off the road before being jerked back onto it." *Id.* at __, 191 L. Ed. 2d at 1622 (Thomas, J., dissenting). The officer then took the defendant's license, registration, and proof of insurance to his patrol vehicle and ran a records check on the defendant. *Id.* at __, 191 L. Ed. 2d at 1613. Upon completion of the records check on the defendant, the officer returned to the defendant's vehicle, asked the passenger for his driver's license, and questioned the passenger concerning their route and reason for traveling. *Id.* The passenger responded that they had gone to Omaha to look at a vehicle for sale and were returning to Norfolk. *Id.* The officer then returned to his patrol vehicle to run a records check on the passenger. *Id.* The officer also called for a second officer at that time. *Id.* Upon completion of the second records check, the officer wrote a warning ticket for the defendant for driving on the shoulder and returned to the defendant's vehicle to issue the warning ticket. *Id.* After issuing and explaining the warning ticket and returning the defendant's and the passenger's documents, the officer then asked for permission to walk his dog around the defendant's vehicle, a request the defendant refused. *Id.* At that time, the officer directed the defendant to turn off and exit the vehicle. *Id.* When a deputy sheriff arrived a few minutes later, the officer retrieved his dog from his patrol vehicle and led the dog around the defendant's vehicle. *Id.* The dog alerted and drugs were discovered during a subsequent search of the defendant's vehicle. *Id.*

The district court denied the defendant's motion to suppress, noting that "in the Eighth Circuit, dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only *de minimis* intrusions." *Id.* at __, 191 L. Ed. 2d at 1613-14 (internal quotation marks omitted). The Eighth Circuit affirmed that the delay in the traffic stop "constituted an acceptable *de minimis* intrusion on [the defendant's] personal liberty" and declined

to address whether the officer had reasonable suspicion to extend the stop. *Id.* at __, 191 L. Ed. 2d at 1614 (internal quotation marks omitted). The U.S. Supreme Court granted *certiorari* and then vacated the judgment of the Eighth Circuit and remanded the case for the Eighth Circuit to consider whether there was reasonable suspicion to detain the defendant beyond the completion of the traffic stop. *Id.* at __, 191 L. Ed. 2d at 1616-17. Upon remand the Eighth Circuit applied the "good-faith exception" and upheld the defendant's conviction. *United States v. Rodriguez*, 799 F.3d 1222 (8th Cir. 2015).

It is important to examine exactly what guidance the Court provided in *Rodriguez*. There Justice Ginsburg explained:

> A seizure for a traffic violation justifies a police investigation of that violation. A relatively brief encounter, a routine traffic stop is more analogous to a so-called "*Terry* stop" than to a formal arrest. Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission" – to address the traffic violation that warranted the stop, and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.
>
> Our decisions in *Caballes* and *Johnson* heed these constraints. In both cases, we concluded that the Fourth Amendment tolerated certain unrelated investigations that did not lengthen the roadside detention. In *Caballes*, however, we cautioned that a traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket. And we repeated that admonition in *Johnson*: The seizure remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop. An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, *absent the reasonable suspicion ordinarily demanded to justify detaining an individual.*

Id. at __, 191 L. Ed. 2d at 1614-15 (internal quotation marks, citations, brackets, and ellipses omitted) (emphasis added).

[1] At the outset it should be noted that while a person has been seized during a traffic stop, that seizure is permissible when based upon reasonable suspicion and statements made during the course of a traffic stop are not custodial statements requiring *Miranda* warnings. *Berkemer v. McCarty*, 468 U.S. 420, 437-42, 82 L. Ed. 2d 317, 332-36 (1984). While such has long been the law, defense counsel in the present case argued that Officer Green should have given defendant a *Miranda* warning before asking any questions. The trial court then issued Conclusion of Law 12, which provides, "[Officer] Green did not advise defendant of his rights pursuant to *Miranda*, and defendant did not waive them." *Miranda*, however, is inapplicable under the circumstances of this case as defendant was not asked any questions post-arrest. All of the questions asked of defendant were during the traffic stop itself and, for the most part, related to the traffic stop, such as route information, vehicle ownership, purpose of the trip, odors emanating from defendant, or responses to questions from defendant, such as whether there were deer along the highway.

[2] In reviewing the guidance from *Rodriguez*, it is clear that a traffic stop may not be unnecessarily extended, "*absent the reasonable suspicion ordinarily demanded to justify detaining an individual.*" *Rodriguez*, __ U.S. at __, 191 L. Ed. 2d at 1615 (emphasis added). In determining whether a stop was unnecessarily extended, the purpose of the stop is paramount. Unrelated investigation is not necessarily prohibited, but extending the stop to conduct such an investigation is prohibited. The question then arises, "When does reasonable suspicion arise?" In *Rodriguez*, the majority opinion made no determination on the issue of reasonable suspicion and remanded the case to the Eighth Circuit to consider the issue. *Id.* at __, 191 L. Ed. 2d at 1616-17.

"[A] trial court's conclusions of law regarding whether the officer had reasonable suspicion [or probable cause] to detain a defendant is reviewable *de novo*." *State v. Hudgins*, 195 N.C. App. 430, 432, 672 S.E.2d 717, 718 (2009) (internal quotation marks and citations omitted). Thus, we review *de novo* the trial court's conclusion in this case that Officer Green lacked reasonable suspicion prior to running the defendant's name through other databases after learning there were no warrants for defendant.

Our Supreme Court has long recognized that "reasonable suspicion" is a relatively low threshold and should be viewed through the eyes of a reasonable officer, giving the officer credit for his training and

experience. In *State v. Williams*, 366 N.C. 110, 726 S.E.2d 161 (2012), our Supreme Court explained:

> An officer has reasonable suspicion if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts. A reviewing court must consider the totality of the circumstances – the whole picture. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. While something more than a mere hunch is required, the reasonable suspicion standard demands less than probable cause and considerably less than preponderance of the evidence.

Id. at 116-17, 726 S.E.2d at 167 (internal quotation marks and citations omitted). Applying this reasonable suspicion standard to the circumstances in *Williams*, our Supreme Court determined the officers involved had reasonable suspicion to justify extending a stop until a canine unit arrived where the occupants of a car they stopped gave inconsistent and unlikely travel information, could not explain where they were going, gave inconsistent statements concerning their familial relationship, and the vehicle with illegally tinted windows was owned by a third person. *Id.* at 117, 726 S.E.2d at 167. The Court further explained that while the factors may not support a reasonable suspicion of criminal activity when viewed individually and in isolation, when "viewed as a whole by a trained law enforcement officer who is familiar with drug trafficking and illegal activity on interstate highways, the responses were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot[.]" *Id.*

Another case demonstrating that a series of innocent factors, when viewed collectively, may rise to the level of reasonable suspicion is *State v. Fisher*, 219 N.C. App. 498, 725 S.E.2d 40 (2012), *disc. rev. denied*, 366 N.C. 425, 759 S.E.2d 83 (2013). In *Fisher*, the State argued the following factors established reasonable suspicion that the defendant was transporting contraband:

> (1) there was an overwhelming odor of air freshener coming from the car; (2) defendant's claim that he made a five hour round trip to go shopping but had not purchased anything; (3) defendant's nervousness; (4) defendant had

> pending drug related charges and was known as a distributor of marijuana and cocaine in another county; (5) defendant was driving in a pack of cars; (6) defendant was driving a car registered to someone else; (7) defendant never asked why he had been stopped; (8) defendant was "eating on the go"; and (9) there was a handprint on the trunk indicating that something had recently been placed in the trunk.

Id. at 502-03, 725 S.E.2d at 44. This Court explained that

> [t]he specific and articulable facts, and the rational inferences drawn from them, are to be viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. In determining whether the further detention was reasonable, the court must consider the totality of the circumstances. Reasonable suspicion only requires a minimal level of objective justification, something more than an unparticularized suspicion or hunch. We emphasize that because the reasonable suspicion standard is a commonsensical proposition, [c]ourts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street.

Id. at 502, 725 S.E.2d at 43 (internal quotation marks and citations omitted). Then, upon review of the factors argued by the State, and despite noting that some of the factors could be construed as innocent behavior, this Court held the trial court erred in determining reasonable suspicion did not exist because multiple other factors present in the case were sufficient to establish reasonable suspicion. *Id.* at 504, 725 S.E.2d at 45. Specifically, the trial court noted "nervousness, the smell of air freshener, inconsistency with regard to travel plans, and driving a car not registered to the defendant." *Id.* (internal citations omitted).

Federal reasonable suspicion cases are also instructive in the present case. Two of those cases are *United States v. Carpenter*, 462 F.3d 981 (8th Cir. 2006), and *United States v. Ludwig*, 641 F.3d 1243 (10th Cir. 2011).

In *Carpenter*, a defendant driving a vehicle with Texas plates exited the interstate highway in Phelps County, Missouri immediately after a sign warned of a drug check point ahead. 462 F.3d at 983. The defendant then drove for a distance before pulling to the shoulder of the road. *Id.* When an officer approached the defendant, the defendant claimed

he was looking to refuel even though he had a quarter of a tank of gas and there were no service stations at the exit. *Id.* at 983-84. The defendant also claimed to be traveling from Austin, Texas, to New York, but the rental agreement for the vehicle showed the vehicle was rented in El Paso. *Id.* After another deputy arrived with a trained drug detection dog, the dog was walked around the defendant's vehicle and alerted. *Id.* at 984. The officer than searched the vehicle and found cocaine, leading to the defendant's arrest. *Id.* In reviewing whether there was reasonable suspicion, the Eighth Circuit explained as follows:

> We consider the totality of circumstances in evaluating whether there was reasonable suspicion that criminal activity was afoot. Reasonable suspicion is a lower threshold than probable cause and it requires considerably less than proof of wrongdoing by a preponderance of the evidence. The behavior on which reasonable suspicion is grounded, therefore, need not establish that the suspect is probably guilty of a crime or eliminate innocent interpretations of the circumstances. Factors consistent with innocent travel, when taken together, can give rise to reasonable suspicion, even though some travelers exhibiting those factors will be innocent. To justify a seizure, however, the officer must have a minimal level of objective justification and something more than an inchoate and unparticularized suspicion or hunch. And the ultimate test is not what the seizing officer actually believed, but what a hypothetical officer in exactly the same circumstances reasonably could have believed.

Id. at 986 (internal citations and quotation marks omitted). The Court then held that the totality of the facts in the case provided reasonable suspicion to justify the detention of the defendant until the drug dog arrived. *Id.* at 987.

In *Ludwig*, a Wyoming state trooper initiated a stop of the defendant's car for speeding. 641 F.3d at 1246. The defendant pulled onto the shoulder of the highway but, strangely, continued driving for a considerable distance on the shoulder before stopping. *Id.* When the trooper approached the car, he smelled a strong odor of cologne and noticed the defendant was trembling so badly that he had difficulty producing his driver's license. *Id.* The trooper then had the defendant accompany him to his patrol car while he wrote the defendant a speeding ticket, during which time the trooper asked about the defendant's travel plans. *Id.* The

defendant advised he was an "IT administrator" and had traveled from New Jersey to San Jose, California, to deal with a "server problem" and was now returning to New Jersey. *Id.* The defendant also stated that he chose to drive instead of flying, had stayed in California for only four days, and had spent the last night in his car. *Id.* The registration and proof of insurance for the defendant's car were not in defendant's name. *Id.* The trooper found the circumstances suspicious and after writing a ticket, detained the defendant for further investigation. *Id.* A drug dog then alerted to the defendant's car and drugs were found during a search. *Id.* In reviewing the district court's denial of the defendant's motion to dismiss, the Tenth Circuit held that the combination of considerations which have been recognized in other cases to contribute to reasonable suspicion led it to hold the reasonable suspicion standard was satisfied. *Id.* at 1248-50 (citing *United States v. Villa-Chaparro*, 115 F.3d 797, 799, 802 (10th Cir. 1997) (failure to promptly stop); *United States v. Ortiz-Ortiz*, 57 F.3d 892, 895 (10th Cir. 1995) (masking odors); *United States v. Turner*, 928 F.2d 956, 959 (10th Cir. 1991) (third-party registration); *United States v. White*, 584 F.3d 935, 943, 951 (10th Cir. 2009) and *United States v. Sokolow*, 490 U.S. 1, 9, 104 L. Ed. 2d 1, __ (1989) (suspect travel schedule); *United States v. Williams*, 271 F.3d 1262, 1269 (10th Cir. 2001) (extreme nervousness)).

As stated earlier, the determination of reasonable suspicion is a conclusion of law which we review *de novo*. In analyzing the facts of the case at bar, we note that a number of factors deemed relevant in *Carpenter*, *Ludwig*, and other cases cited herein were present and were known to Officer Green before he had defendant join him in the patrol vehicle – an unusual story regarding his travel as he did not know his destination or was concealing it, *United States v. White*, *supra*; a masking odor, *United States v. Ortiz-Ortiz*, *supra*; third-party registration, *United States v. Turner*, *supra*; and nervousness, *United States v. Williams*, *supra*. These factors were known to Officer Green while he stood on the roadside before defendant joined him in the patrol vehicle. Then while running defendant's name for warrants in the patrol vehicle, an action permitted in *Rodriguez*, the officer smelled marijuana on defendant's person and learned from defendant that defendant had a DUI based on his own marijuana usage. The trial court's conclusion that Officer Green lacked reasonable suspicion despite all of these factors discussed herein is incorrect. It bears repeating that reasonable suspicion is a common sense determination made by a reasonable officer, giving the officer credit for his training and experience and viewing the totality of the circumstances. While there might be someone who would borrow a car, drive eleven hours to "hang out" with a friend named Eric

at an unknown location, spend a few days and return, it is a rather bizarre story. Reasonable suspicion does not depend on a proven lie, but is based on the totality of the circumstances. Based on defendant's bizarre travel plans, his extreme nervousness, the use of masking odors, the smell of marijuana on his person, and the third-party registration of the vehicle, it is reasonable that even an untrained person would doubt defendant's story, much less a fifteen-year veteran with interdiction training. Thus, we hold that Officer Green had reasonable suspicion to extend the stop and could run such ancillary records checks as he believed reasonable until his investigation was complete. The time it took for him to complete what is described in his testimony as a "pipeline" check and an EPIC check were both done relatively quickly and, when the warning ticket was issued, there had been no unreasonable extension of the stop.

The trial court issued conclusions of law that were phrased in the alternative and, thus, are somewhat confusing. For instance, Conclusion of Law 4 provides:

> 4. Even if the stop was reasonable in scope and duration up to the point of the issuance of the warning ticket, the extension of the stop after the issuance of the warning ticket was also unreasonable in both scope and duration, without reasonable suspicion to believe that criminal activity was afoot.

This conclusion of law is expressly overruled as we have held that the evidence clearly showed that Officer Green had reasonable suspicion from the time he and defendant sat down in the patrol car.

[3] Not only did Officer Green not unreasonably extend the stop, shortly after the warning ticket was written and as Officer Green handed the ticket to defendant, Officer Green, in light of smelling marijuana and defendant's admission to using marijuana, asked whether there was any marijuana in defendant's vehicle. Defendant denied there was anything in the car stating, "you can search if you want to search." The trial court found that Castillo stated that the officer could search, yet concluded consent was not freely given. It appears the trial court may have concluded that consent was not freely given because the trial court judge misunderstood the law and did not have the sequence of events in their correct order. The trial court's order contains the following findings of fact:

> 31. Approximately seventeen minutes into the stop, Green received word from Durham dispatch that there were no outstanding warrants for the driver.

> 32. Approximately thirty-seven minutes into the stop, Green printed out a warning ticket for speeding.
>
> 33. At that point, Green told defendant to sit tight or otherwise indicated he wished him to remain in the vehicle. Green did not seek or gain consent for the extension of this stop. There was no point throughout the encounter in which Green indicated, verbally or otherwise, that defendant was not required to remain with the officer. At no point did Green let defendant know he was free to leave.

The trial judge then made Finding of Fact 34, which provides in pertinent part that "Green asked defendant if there was any marijuana in the car, but did not specifically seek permission to search the vehicle. The defendant responded negatively, and told the officer, 'you can search if you want to search.' "

In making these findings, the trial judge had the sequence of events out of order. In fact, it was after defendant informed Officer Green that the officer could search if he wanted to that Officer Green told defendant to "sit tight[,]" as recounted in Finding of Fact 33. If the officer had in fact detained defendant without reasonable suspicion and ordered him to "sit tight[,]" perhaps one could conclude that consent was not freely and unequivocally given. While the issue of valid consent may be an issue of fact, that determination must be founded upon a correct factual basis. Ultimately these facts must support a conclusion of law that consent was or was not freely given. *See State v. Brown*, 306 N.C. 151, 169-71, 293 S.E.2d 569, 581-82 (1982). In the case at bar, the defendant clearly stated "you can search, if you want to search[,]" after which, not before, Officer Green tells defendant to "sit tight" and retrieves his gloves from the back seat of his patrol vehicle before beginning the search of defendant's vehicle. Thus, the trial court's Conclusion of Law 9, wherein the court concluded defendant's consent was not clear and unequivocal, is premised on both incorrect facts and a misunderstanding of the law. As such, the court's conclusion of law is clearly erroneous. *See State v. Smith*, 346 N.C. 794, 799-800, 488 S.E.2d 210, 213-14 (1997). In *Smith*, our Supreme Court held the trial court erred in concluding the defendant's consent was not voluntary because it appeared that the trial judge believed that the "knock and talk" law enforcement technique was unconstitutional. *Id.* Furthermore, the Court reversed because the trial court did not make a specific finding that consent was voluntary. *Id.* In the present case, it appears the trial judge believed that Officer Green lacked reasonable suspicion to extend the stop and the unlawful extension impinged on defendant's ability to consent. Additionally, it

appears the trial court misunderstood the correct sequence of events. As a result, the trial court's factual findings do not support the conclusion of law that "defendant did not give lawful consent for the search." The trial court's conclusion is subject to reversal.

The case at bar is very similar to that of *U.S. v. Cardenas-Alatorre*, 485 F.3d 1111, 1118-20 (10th Cir. 2007), in which the Court held the district court's finding of voluntary consent was not clearly erroneous based on video of the encounter that showed no evidence of coercion and that the defendant continued to respond to officer's questions. 485 F.3d at 1118-20. Similarly, the entire encounter between Officer Green and defendant in this case was recorded on video. On the video, defendant can be clearly heard telling Officer Green he can search and talking to Officer Green and other officers during the search. There is no evidence to suggest defendant's consent was anything but voluntary and, therefore, we hold the trial court's conclusion that "defendant did not give lawful consent" is clearly erroneous.

IV. Conclusion

In conclusion, we hold Officer Green had reasonable suspicion to extend the traffic stop prior to entering his patrol vehicle with defendant. Thus, the traffic stop was not unlawfully extended. We also hold the trial court's conclusion that defendant's consent was not clear and unequivocal was based on a misapprehension of both the law and the factual sequence of events and, thus, was clearly erroneous. Consequently, we reverse the trial court's order suppressing the evidence in this case and remand the case to Durham County Superior Court for trial.

REVERSED.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA
v.
CALEB HOPKIRK-RIDLEN HILL, DEFENDANT

No. COA15-675

Filed 3 May 2016

1. Evidence—identification of defendant in surveillance video—special knowledge—helpful to jury

In defendant's trial for crimes based on multiple break-ins at a shopping center, the trial court did not abuse its discretion by allowing the testimony of two law enforcement officers who identified defendant in a surveillance video from the shopping center. The officers had interacted with defendant numerous times previously, and they were familiar with the distinctive features of his face, posture, and gait. Further, defendant's appearance had changed between the time the crimes were committed and the trial. The officers' testimony was rationally based on their special knowledge of defendant and was helpful to the jury's determination of whether defendant was the person in the video.

2. Indictment and Information—fatal variance—owner of stolen property—lawful custody and possession

Where defendant argued on appeal that there was a fatal variance between the allegations in his indictment and the evidence at trial, but he failed to preserve the issue at trial, the Court of Appeals invoked Rule 2 of the Rules of Appellate Procedure to consider one of his arguments on the issue—that the indictment stated he stole an iPod and $5.00 from Tutti Frutti, LLC, while the proof showed that the items belonged to the son of Tutti Frutti's owner. Reconciling two seemingly inconsistent decisions, the Court of Appeals held that there was a fatal variance between the indictment and the proof at trial because the State failed to establish that the alleged owner of the stolen property had lawful possession and custody of the property.

3. Constitutional Law—effective assistance of counsel—issues considered on appeal

Where defendant was convicted for multiple crimes related to break-ins at a shopping center and argued on appeal that his counsel's failure to raise fatal variances between the indictment and evidence at trial constituted ineffective assistance of counsel, the Court

of Appeals' conclusion that his fatal variance claim concerning damage to property was meritless rendered that ineffective assistance claim meritless. As for his fatal variance claim related to the iPod and money, because the Court of Appeals agreed with his argument on the merits and vacated that count of larceny, there was no need to address counsel's performance on that issue.

4. Larceny—restitution—erroneously ordered

Where defendant argued, and the State conceded, that the trial court erred by ordering him to pay $698.08 in restitution for items taken from a doctor's office where the jury acquitted him of the larceny charge concerning that office, the Court of Appeals vacated that award of restitution.

Appeal by defendant from judgments entered 3 December 2014 by Judge Edwin G. Wilson, Jr. in Orange County Superior Court. Heard in the Court of Appeals 3 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Derek L. Hunter, for the State.

James W. Carter, for defendant-appellant.

DIETZ, Judge.

Defendant Caleb Hill appeals his convictions on multiple counts of breaking and entering, larceny, and injury to real property based on a series of break-ins at businesses in a shopping center in Chapel Hill.

Hill first argues that the trial court erred by failing to exclude the testimony of two law enforcement officers who identified him in surveillance video from the shopping center. As explained below, the officers were familiar with Hill and recognized distinct features of Hill's face, posture, and gait that would not have been evident to the jurors. Hill's appearance also had changed from the time of the crimes to the time of trial, and the officers' testimony assisted the jury in understanding Hill's appearance at the time of the crime and its similarity to the person in the surveillance videos. Accordingly, the trial court did not abuse its discretion in permitting this testimony.

Hill also argues that there were several fatal variances between the indictment and the evidence at trial. Hill failed to raise these issues at trial and they are waived on appeal. However, we conclude that one of

these fatal variance arguments is meritorious and exercise our discretion under Rule 2 to suspend the appellate preservation rules and consider that argument, which concerns the theft of money and an iPod from a frozen yogurt shop. As explained in more detail below, the State alleged the property belonged to Tutti Frutti, LLC, but it actually belonged to Jason Wei, the son of the sole member of that limited liability company. Moreover, the State failed to show that Tutti Frutti, LLC was in lawful custody and possession of Mr. Wei's property at the time it was stolen. Accordingly, we vacate that conviction but reject Hill's other fatal variance claims.

Finally, Hill argues—and the State concedes—that the trial court's award of restitution is erroneous because it included restitution for a larceny for which Hill was acquitted. We vacate the portion of Hill's sentence concerning restitution and remand this case for further proceedings on that issue.

Facts and Procedural History

At or around 4:00 a.m. on 7 November 2013, a property manager for Bryan Properties, Inc. received a call that the alarm for the Lumina Theater, one of the properties her company manages at Southern Village in Chapel Hill, was going off and police had been dispatched. Upon arrival, she learned that four other businesses surrounding the theater had also been broken into, including Subway, Village Pediatrics, Tutti Frutti (a frozen yogurt shop), and Town Hall Grill. The suspect entered each business by shattering a glass window or door except for Town Hall Grill where there was no entry because the glass did not shatter. A second property manager pulled the surveillance videos from Lumina Theater, which showed a suspect inside. Surveillance video also showed a person breaking into both Subway and Village Pediatrics. Jason Wei, son of the owner of the Tutti Frutti store,[1] also turned over surveillance video and reported that his iPod had been taken but was not sure if any money had been stolen. A physician at Village Pediatrics also reported that her Hewlett-Packard laptop was missing from her office.

Officers and investigators of the Chapel Hill Police Department arrived, including Officer Shane Osborne. After reviewing the surveillance videos, he was sure that he recognized the suspect as Caleb Hill. The Subway video gave Osborne the best opportunity to get a good look

1. More accurately, Mr. Wei's father apparently is the sole member of Tutti Frutti, LLC, which owns the store. We refer to Jason Wei as the "owner's son" for consistency because that is how the parties' briefs describe him.

at the face of the suspect, and Osborne was then "100 percent sure" it was Hill. Officer Osborne was familiar with Hill from prior interactions with him. He and his partner, Officer Ragan Bradley Kramer, arrested Hill in May 2013, and between then and 7 November 2013, had seen Hill approximately ten to fifteen times in the community. Officer Osborne last saw Hill approximately two weeks before the Southern Village break-ins.

When Officer Osborne viewed the video footage, he recognized Hill based on a number of factors. Osborne noticed Hill's irregular, hunched-over posture and the way he dragged his feet when he walked. He also noticed Hill's distinctive facial features, including the ridge line of his eyebrows, his nose, chin, and deep-sunken eyes. Finally, Osborne saw that the person in the video wore the same clothes, including unusually long and ill-fitting pants, worn by Hill in the previous encounters between the two. Confident in his identification, Officer Osborne showed the video to Officer Kramer, who also was familiar with Hill's appearance. Officer Kramer agreed that the suspect in the video was Hill.

Police arrested Hill and questioned him at the police station. During the questioning, Officer Osborne noticed a small piece of tempered glass on the floor near Hill. Osborne suspected this glass may be related to the shattered glass doors at Southern Village. When Osborne asked about the glass, Hill became very defensive and refused to answer further questions.

At trial, the prosecution played the surveillance videos for the jury. Officer Kramer and Officer Osborne testified that they believed the suspect in the surveillance videos was Hill based on their familiarity with Hill's distinctive features. Hill moved to exclude the officer identification, and the trial court denied the motion. Hill also moved to dismiss his charges at the close of the State's case and the close of all evidence. The trial court denied those motions as well.

The jury returned a verdict of not guilty on one count of felony larceny but convicted Hill on the remaining counts, including four counts of breaking and entering, one count of attempted breaking and entering, two counts of felony larceny after a breaking and entering, and five counts of injury to real property. Hill timely appealed.

Analysis

Hill raises four issues on appeal: (1) whether the trial court erred in allowing Officers Osborne and Kramer to testify that they believed Hill was the person seen in the surveillance videos; (2) whether there were several fatal variances in the indictments; (3) whether he received

ineffective assistance of counsel; and (4) whether the trial court erred in its restitution award. We address these issues in turn.

I. Officer Testimony Concerning the Surveillance Videos

[1] Hill first argues that the trial court erred in allowing Officers Osborne and Kramer to give their lay opinions that the person in the surveillance videos was Hill. Specifically, Hill alleges the officers were no better qualified than the jury to identify the suspect in the videos and, therefore, he was prejudiced by the admission of their testimony. We do not agree.

We review the trial court's decision to admit testimony for abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000). Admissible lay opinion testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." *Id.* This Court has identified the following factors as relevant to determining whether a witness's identification of the defendant from surveillance footage is admissible:

> (1) the witness's general level of familiarity with the defendant's appearance;
>
> (2) the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or when the defendant was dressed in a manner similar to the individual depicted in the photograph;
>
> (3) whether the defendant had disguised his appearance at the time of the offense; and
>
> (4) whether the defendant had altered his appearance prior to trial.

State v. Collins, 216 N.C. App. 249, 255–56, 716 S.E.2d 255, 260 (2011).

Here, Officers Osborne and Kramer testified that they both had previous interactions with Hill, including having arrested him in 2013. Officer Osborne testified that he had seen Hill some ten to fifteen times between May and November 2013. Osborne also testified that he had seen Hill approximately two weeks before the Southern Village breakins. Officer Kramer testified that he had seen Hill several times and that he occasionally spoke to him. During his testimony, Officer Osborne also narrated the surveillance video for the jury and pointed out the exact points in the video where he was able to get a good look at the suspect. He referenced the features of the person in the video—pronounced eyebrows, pointy nose, very set-in eyes, cleft chin—as well as the person's

irregular posture and gait as factors which helped him determine that the suspect was Hill based on his familiarity with Hill. After viewing the video, Officer Osborne was "100 percent sure" Hill was the person in the video and later asked Officer Kramer to view it. Kramer agreed that he too was "100 percent sure" the suspect in the video was Hill. At trial, Officer Kramer also pointed to Hill's distinct facial features as the reason he recognized Hill.

Moreover, Hill's appearance changed between the time the crimes were committed and the trial. Hill had grown a beard and lost weight by the time of trial. Officer Osborne testified that Hill looked "very different. . . . [W]hen I dealt with him he did not look like he does today." In light of the officers' familiarity with the distinctive features of Hill's face, posture, and gait, and Hill's changed appearance, we hold that the officers' testimony was rationally based on their special knowledge of Hill's appearance and was helpful to the jury's determination of whether Hill was the person seen in the video. Accordingly, the trial court did not abuse its discretion in admitting the officers' testimony.

II. Fatal Variance Arguments

[2] Hill next argues that there was a fatal variance between the allegations in the indictment and the evidence at trial. Hill concedes that he failed to preserve this issue for appellate review but asks this Court to invoke Rule 2 of the Rules of Appellate Procedure to review the issue. As explained below, we exercise our discretion and invoke Rule 2 with respect to one of Hill's arguments.

This Court repeatedly has held that a "[d]efendant must preserve the right to appeal a fatal variance." *State v. Mason*, 222 N.C. App. 223, 226, 730 S.E.2d 795, 798 (2012); *State v. Pender*, __ N.C. App. __, 776 S.E.2d 352, 358 (2015). If the fatal variance was not raised in the trial court, this Court lacks the ability to review that issue. *Mason*, 222 N.C. App. at 226, 730 S.E.2d at 798. Rule 2 of the Rules of Appellate Procedure permits this Court to suspend the rules regarding preservation of issues for appeal. But this Court can invoke Rule 2 only in "exceptional circumstances . . . in which a fundamental purpose of the appellate rules is at stake." *Pender*, __ N.C. App. at __, 776 S.E.2d at 358 (alteration in original).

Hill first argues that there was a fatal variance between the allegation that he stole an iPod and $5.00 from Tutti Frutti, LLC and the proof at trial, which showed that the iPod and any stolen money belonged to Jason Wei, the son of the owner of the Tutti Frutti store. As explained below, we believe this argument has merit. We therefore exercise our

discretion to hear this issue despite Hill's failure to preserve it below. *See State v. Gayton-Barbosa*, 197 N.C. App. 129, 134–35, 676 S.E.2d 586, 589–90 (2009).

This issue requires us to reconcile seemingly inconsistent decisions from this Court cited by the parties. In *State v. Johnson*, an indictment alleged that the defendant stole two letter openers owned by a church, but the proof at trial was that the letter openers belonged to a priest, not to the church. 77 N.C. App. 583, 585, 335 S.E.2d 770, 772 (1985). This Court held that the discrepancy amounted to a fatal variance between the indictment and the proof. *Id.*

By contrast, in *State v. Graham*, an indictment alleged that the defendant stole money and a radio owned by the Maury Post Office, but the proof at trial was that the money and radio belonged to the postmaster, not to the post office. 47 N.C. App. 303, 307, 267 S.E.2d 56, 59 (1980). This Court held that proof "that the post office is not the owner of such property is not a fatal defect in such a case as this where the property stolen was owned by the postmaster and he had left the property in the post office." *Id.* The Court explained that "[t]he post office was in lawful custody and possession of the property at the time it was taken[.]" *Id.*

These cases involve virtually identical factual scenarios, with the only distinguishing factor being the apparent proof in *Graham* that the post office was in "lawful custody and possession" of the postmaster's property. We are bound by all past precedent of this Court and, in an effort to harmonize these decisions, conclude that *Graham* applies only when there is proof at trial that the person named as the property's owner in the indictment was in "lawful custody and possession" of the property, even if it actually was owned by someone else.

Other cases confirm our interpretation of the distinction between the *Johnson* and *Graham* holdings. For example, in *State v. Liddell*, the indictment alleged that the defendant stole some cigarettes, money, and hamburger patties belonging to Lees-McRae College. 39 N.C. App. 373, 374, 250 S.E.2d 77, 78 (1979). The proof at trial showed that the property belonged to vendors who supplied the college's vending machines and cafeteria. *Id.* This Court affirmed the conviction, holding that the evidence showed Lees-McRae College "was in lawful possession of the property at the time of the offense" because it fit the "definition of a bailee." *Id.* at 375, 250 S.E.2d at 79. Other cases from this Court have reached similar results. *See State v. Holley*, 35 N.C. App. 64, 67, 239 S.E.2d 853, 855 (1978); *State v. Vawter*, 33 N.C. App. 131, 136, 234 S.E.2d 438, 441 (1977). Accordingly, we hold that there is no fatal variance

between an indictment and the proof at trial if the State establishes that the alleged owner of stolen property had lawful possession and custody of the property, even if it did not actually own the property.

Here, the State points to no evidence at trial proving that Tutti Frutti, LLC was in lawful custody and possession of Jason Wei's money and iPod. Indeed, there was no testimony at all concerning why Mr. Wei's money and iPod were at the store. Thus, we conclude that we are bound by *Johnson* and must vacate this count of larceny after breaking and entering because of a fatal variance between the indictment and the proof at trial.

Hill also argues that there was a fatal variance between the allegation that the broken windows and other real property at Southern Village belonged to Bryan Properties and the proof at trial, which established that Bryan Properties merely managed the property for some other owner. Unlike Mr. Wei's iPod, there was evidence at trial that Bryan Properties had "lawful custody and possession" of the damaged property. Moreover, our Supreme Court recently held that an indictment charging a defendant with damage to real property need only identify the real property itself, not its owner, to be valid. *State v. Spivey*, __ N.C. __, __ S.E.2d __ (2016). Thus, unlike the allegations involving Tutti Frutti, we do not believe any variance on the allegations concerning Bryan Properties would be fatal. We therefore decline to invoke Rule 2 because this argument does not present the sort of "exceptional circumstances . . . in which a fundamental purpose of the appellate rules is at stake." *Pender*, __ N.C. App. at __, 776 S.E.2d at 358.

III. Ineffective Assistance of Counsel

[3] Hill next contends that his counsel's failure to raise the fatal variance issues at trial deprived him of his Sixth Amendment right to the effective assistance of counsel. Our conclusion that Hill's fatal variance claim concerning damage to property at Southern Village is meritless necessarily means that counsel's failure to raise that issue was not deficient performance. *See Pender*, __ N.C. App. at __, 776 S.E.2d at 358. Likewise, our conclusion that Hill's fatal variance claim concerning the money and iPod is meritorious, and that we will therefore excuse counsel's failure to preserve the issue below by invoking Rule 2, obviates our need to address counsel's performance on this issue.

IV. Restitution

[4] Finally, Hill argues—and the State concedes—that the trial court erred by ordering Hill to pay $698.08 in restitution for items taken from

Village Pediatrics because the jury acquitted Hill of the larceny charge concerning Village Pediatrics. Both parties agree that the appropriate remedy is to vacate the portion of Hill's sentence imposing restitution and remand this case for further proceedings on the issue of restitution. We agree, vacate the award of restitution, and remand to the trial court for further proceedings.

Conclusion

We vacate the count of felony larceny after a breaking and entering concerning Tutti Frutti, LLC but affirm the remaining convictions. We vacate the restitution award. We remand for further proceedings consistent with this opinion.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges STROUD and TYSON concur.

STATE OF NORTH CAROLINA
v.
HARRY SHAROD JAMES

No. COA15-684

Filed 3 May 2016

1. Constitutional Law—ex post facto laws—first-degree murder—resentencing guidelines

Defendant's resentencing for first-degree murder pursuant to N.C.G.S. § 15A-1340.19A *et seq.* did not violate the constitutional prohibitions on *ex post facto* laws. Because N.C.G.S. § 15A-1340.19A *et seq.* does not impose a more severe punishment than that originally mandated in N.C.G.S. § 14-17, but instead provides sentencing guidelines that comply with the United States Supreme Court's decision in *Miller* and allows the trial court discretion to impose a lesser punishment based on applicable mitigating factors, defendant could not be disadvantaged.

2. Constitutional Law—cruel and unusual punishment—sentencing—juvenile offender

N.C.G.S. § 15A-1340.19A *et seq.* does not violate the constitutional guarantees against cruel and unusual punishment. It is not

inappropriate or unconstitutional for the sentencing analysis in N.C.G.S. § 15A-1340.19A *et seq.* to begin with a sentence of life without parole and require the sentencing court to consider mitigating factors to determine whether the circumstances are such that a juvenile offender should be sentenced to life with parole instead of life without parole. Life without parole as the starting point in the analysis does not guarantee it will be the norm.

3. Constitutional Law—due process—sentencing guidelines—trial by jury

N.C.G.S. § 15A-1340.19A *et seq.* does not violate the right to due process of law. The discretion of the sentencing court is guided by *Miller* and the mitigating factors provided in N.C.G.S. § 15A-1340.19B(c). Although defendant contended that N.C.G.S. § 15A-1340.19A *et seq.* violated the right to trial by jury, no jury determination was required and thus defendant's argument was without merit.

4. Sentencing—mitigating factors—sufficiency of findings of fact

The trial court erred in a first-degree murder case by failing to make adequate findings of fact to support its decision to impose a sentence of life without parole. Nowhere in the order did the resentencing court indicate which evidence demonstrated the absence or presence of any mitigating factors.

5. Sentencing—life without parole—sufficiency of findings of fact—mitigating factors

The trial court abused its discretion in a first-degree murder case by resentencing defendant to life without parole under N.C.G.S. § 15A-1340.19A *et seq.* The trial court did not issue sufficient findings of fact on the absence or presence of mitigate factors. The case was reversed and remanded to the trial court for further sentencing proceedings.

Appeal by defendant from judgment entered 12 December 2014 by Judge Robert F. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 November 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defenders David W. Andrews and Barbara S. Blackman, for defendant-appellant.

McCULLOUGH, Judge.

Harry Sharod James ("defendant") appeals from judgment entered upon his resentencing for first-degree murder as ordered by our Supreme Court. For the following reasons, we affirm the constitutionality of N.C. Gen. Stat. § 15A-1340.19A et seq., but reverse and remand this case for further resentencing proceedings.

I. Background

On 19 June 2006, a Mecklenburg County Grand Jury indicted defendant on one count of murder and one count of robbery with a dangerous weapon. The indictments were the result of events that occurred on 12 May 2006 when defendant was sixteen years old.

At the conclusion of defendant's trial on 10 June 2010, a jury returned verdicts finding defendant guilty of first-degree murder both on the basis of malice, premeditation, and deliberation and under the first-degree felony murder rule and finding defendant guilty of robbery with a dangerous weapon. The trial court then entered separate judgments sentencing defendant to a term of life imprisonment without the possibility of parole for first-degree murder and sentencing defendant to a concurrent term of 64 to 86 months imprisonment for robbery with a dangerous weapon. Defendant's sentence of life without parole for first-degree murder was mandated by the version of N.C. Gen. Stat. § 14-17 in effect at that time. *See* N.C. Gen. Stat. § 14-17 (2010).

Defendant appealed to this Court and, among other issues, argued a sentence of life without the possibility of parole for a juvenile was cruel and unusual punishment in violation of the juvenile's rights under the Eight Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. In asserting his argument, defendant identified two cases in which petitions for writ of certiorari were pending before the United States Supreme Court seeking review of the constitutionality of sentences of life without parole for juveniles.

On 18 October 2011, this Court filed an unpublished opinion in defendant's case holding the constitutional issue was not preserved for appeal and finding no error below. *State v. James*, __ N.C. App. __, 716 S.E.2d 876, available at 2011 WL 4917045 (18 October 2011) (unpub.). In so holding, we explained that defendant failed to preserve the issue by objecting at trial and, although significant changes in the applicable law may warrant review in some instances where an issue is not otherwise preserved, there had been no change in the law as it relates to sentencing

juveniles to life without parole because the petitions for writ of certiorari in the cases referenced by defendant were still pending before the United States Supreme Court and there was no guarantee the Court would grant certiorari in either case, much less hold that sentences of life without parole for juveniles are unconstitutional. *Id.* at *5. From this Court's unanimous decision, defendant petitioned our Supreme Court for discretionary review.

Before our Supreme Court acted regarding defendant's petition in this case, the United States Supreme Court granted certiorari in the two cases referenced in defendant's argument to this Court, heard arguments in those cases in tandem on 20 March 2012, and issued its decision in *Miller v. Alabama*, 567 U.S. __, 183 L. Ed. 2d 407 (2012), on 25 June 2012. In *Miller*, the Court meticulously reviewed its decisions in *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005) (holding imposition of the death penalty on juvenile offenders is prohibited by the Eighth Amendment), and *Graham v. Florida*, 560 U.S. 48, 176 L. Ed. 2d 825 (2010) (holding the imposition of a sentence of life without parole on a juvenile offender who did not commit homicide is prohibited by the Eighth Amendment), and then held "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at __, 183 L. Ed. 2d at 424. The Court summarized the rationale for its holding as follows:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at __, 183 L. Ed. 2d at 423 (internal citations omitted). More concisely, "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at __, 183 L. Ed. 2d at 422. "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* at __, 183 L. Ed. 2d at 424. Thus, "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at __, 183 L. Ed. 2d at 430.

In response to *Miller*, our General Assembly approved "an act to amend the state sentencing laws to comply with the United States Supreme Court decision in *Miller v. Alabama*" (the "Act") on 12 July 2012. *See* 2012 N.C. Sess. Laws 148 (eff. 12 July 2012). To meet the requirements of *Miller*, the first section of the Act established new sentencing guidelines for defendants convicted of first-degree murder who were under the age of eighteen at the time of their offense. *See* 2012 N.C. Sess. Laws 148, sec. 1. The new sentencing guidelines, originally designated to be codified in Article 93 of Chapter 15A of the North Carolina General Statutes as N.C. Gen. Stat. §§ 15A-1476 to -1479, are now codified in Part 2A of Chapter 81B of Chapter 15A of the North Carolina General Statutes as N.C. Gen. Stat. §§ 15A-1340.19A to -1340.19D. N.C. Gen. Stat. § 14-17 was later amended to indicate that juveniles were to be sentenced pursuant to the new sentencing guidelines. *See* 2013 N.C. Sess. Laws 410, sec. 3(a) (eff. 23 August 2013) (amending N.C. Gen. Stat. § 14-17 to provide that "any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, *except that any such person who was under 18 years of age at the time of the murder shall be punished in accordance with Part 2A of Article 81B of Chapter 15A of the General Statutes.*") (emphasis added).

Following the enactment of the Act, our Supreme Court, by special order on 23 August 2012, allowed defendant's petition in this case as follows:

> Defendant's Petition for Discretionary Review as amended is allowed for the limited purpose of remanding to the Court of Appeals for further remand to the trial court for resentencing pursuant to [the new sentencing guidelines].

State v. James, 366 N.C. 214, 748 S.E.2d 527 (2012).

Prior to defendant's case coming on for resentencing, defendant filed various motions with memorandums of law seeking to avoid resentencing pursuant to N.C. Gen. Stat. § 15A-1340.19A *et seq.* Those motions raised many of the same issues now before this Court on appeal.

On 5 December 2014, defendant's case came on for a resentencing hearing in Mecklenburg County Superior Court before the Honorable Robert F. Johnson. That sentencing hearing continued on 8 December 2014 and concluded on 12 December 2014. Upon considering defendant's motions, the trial court denied the motions and proceeded to resentence defendant to life imprisonment without parole for first-degree murder pursuant to N.C. Gen. Stat. § 15A-1340.19A *et seq.* The judgment indicated it was *nunc pro tunc* 10 June 2010. A resentencing order filed the same day was attached to the judgment. Defendant gave notice of appeal in open court.

II. Discussion

In *State v. Lovette*, 225 N.C. App. 456, 737 S.E.2d 432 (2013) ("*Lovette I*"), this Court summarized the pertinent portions of the new sentencing guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq.* as follows:

> [N.C. Gen. Stat. §] 15A-1340.19B(a) provides that if the defendant was convicted of first-degree murder *solely* on the basis of the felony murder rule, his sentence shall be life imprisonment with parole. N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2012). In all other cases, the trial court is directed to hold a hearing to consider any mitigating circumstances, *inter alia*, those related to the defendant's age at the time of the offense, immaturity, and ability to benefit from rehabilitation. N.C. Gen. Stat. §§ 15A-1340.19B, 15A-1340.19C. Following such a hearing, the trial court is directed to make findings on the presence and/or absence of any such mitigating factors, and is given the discretion to sentence the defendant to life imprisonment either with or without parole. N.C. Gen. Stat. §§ 15A-1340.19B(a)(2), 15A-1340.19C(a).

Id. at 470, 737 S.E.2d at 441 (footnote omitted). Defendant now asserts constitutional arguments against his resentencing pursuant to N.C. Gen. Stat. § 15A-1340.19A *et seq.* Defendant also argues the trial court failed to make proper findings of fact and abused its discretion in imposing a sentence of life without parole. We address the issues in the order they are raised on appeal.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010). "The standard of review for application of mitigating factors is an abuse of discretion." *State v. Hull*, __ N.C. App. __, __, 762 S.E.2d 915, 920 (2014).

1. *Ex Post Facto*

[1] Defendant first argues that his resentencing pursuant to N.C. Gen. Stat. § 15A-1340.19A *et seq.* violates the constitutional prohibitions on *ex post facto* laws. *See* U.S. Const. art. I, § 10, cl. 1; N.C. Const. art. I, § 16. Defendant contends he should have been resentenced "consistent with sentencing alternatives available as of the date of the commission of the offense[,]" specifically, "within the range for the lesser-included offense of second-degree murder." We are not persuaded.

Pertinent to this appeal, our Courts have "defined an *ex post facto* law as one which . . . allows imposition of a different or greater punishment than was permitted when the crime was committed . . . ." *State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991) (citing *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648, 650 (1798)). Our Courts have also recognized that "[t]here are two critical elements to an *ex post facto* law: that it is applied to events occurring before its creation and that it disadvantages the accused that it affects." *State v. Barnes*, 345 N.C. 184, 234, 481 S.E.2d 44, 71 (1997).

There is no dispute concerning the first element in this case. N.C. Gen. Stat. § 15A-1340.19A *et seq.* was enacted on 12 July 2012, over six years after defendant committed the offense on 12 May 2006. Thus, the trial court's application of N.C. Gen. Stat. § 15A-1340.19A *et seq.* in resentencing defendant was retroactive.

Regarding the second element, defendant claims he was disadvantaged by the retroactive application of N.C. Gen. Stat. § 15A-1340.19A *et seq.* Upon review, we hold there is no merit to defendant's claim. As noted above, at the time defendant committed the offense, N.C. Gen. Stat. § 14-17 mandated that defendant be sentenced to life without parole. N.C. Gen. Stat. § 15A-1340.19A *et seq.*, enacted by the General Assembly in response to the United States Supreme Court's holding in *Miller* that mandatory sentences of life without parole for juvenile offenders are unconstitutional, does not impose a different or greater punishment than was permitted when the crime was committed; nor does it disadvantage defendant in any way. N.C. Gen. Stat. § 15A-1340.19A *et seq.*

merely provides sentencing guidelines that address the concerns raised in *Miller* by requiring a sentencing hearing in which the trial court must consider mitigating circumstances before imposing a sentence of life without parole, the harshest penalty for a juvenile. Thus, under N.C. Gen. Stat. § 15A-1340.19A *et seq.*, the harshest penalty remains life without parole, but the trial court has the option of imposing a lesser sentence of life imprisonment with parole. *See* N.C. Gen. Stat. § 15A-1340.19B(a)(2).

Nevertheless, defendant contends that he should have been resentenced to the most severe constitutional penalty at the time the offense was committed. Defendant claims "[t]he only constitutional sentence [he] could have received was a sentence within the range for the lesser-included offense of second-degree murder[,]" which would have resulted in a lesser sentence. In support of his argument, defendant relies on cases from other jurisdictions. *See State v. Roberts*, 340 So. 2d 263 (La. 1976); *Jackson v. Norris*, 426 S.W.3d 906 (Ark. 2013); *Commonwealth v. Brown*, 1 N.E.3d 259 (Mass. 2013). Yet, in the cases cited by defendant, there is no indication that the legislatures in those states enacted new sentencing guidelines that controlled after the mandatory sentences provided in their respective statutes were determined unconstitutional. In fact, the court in *Brown* indicated that the trial judge's sentencing approach was due in part to the fact that "the Legislature had not prescribed the procedures for the individualized sentencing hearing contemplated by *Miller*[.]" 1 N.E.3d at 262. As a result, the courts in those cases severed the unconstitutional portions of the statutes in effect at the time of the offenses and sentenced the defendants pursuant to the remaining constitutional portions of the statutes.[1]

In the present case, however, the General Assembly acted quickly in response to *Miller* and passed the Act, establishing new sentencing

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1. In *Roberts*, the defendant's death sentence was unconstitutional and the court remanded with instructions for the lower court to resentence the defendant to "imprisonment at hard labor for life without eligibility for parole, probation or suspension of sentence for a period of twenty years[,]" the most severe constitutional penalty for criminal homicide at the time. 340 So. 2d at 263-64. In *Jackson*, the juvenile defendant's mandatory sentence of life without parole for capital murder was unconstitutional and the court remanded with instructions that the lower court "hold a sentencing hearing where [the defendant] may present *Miller* evidence for consideration[]" and "[the defendant's] sentence must fall within the statutory discretionary sentencing range for a Class Y felony[,] . . . a discretionary sentencing range of not less than ten years and not more than forty years, or life." 426 S.W.3d at 911. In *Brown*, the juvenile defendant's mandatory sentence of life without parole for first-degree murder was unconstitutional and the court remanded to the lower court for resentencing with instructions that the defendant be sentenced to a mandatory sentence of life with the possibility of parole. 1 N.E.3d at 268.

guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq.* for juveniles convicted of first-degree murder. The General Assembly made clear that N.C. Gen. Stat. § 15A-1340.19A *et seq.* was to apply retroactively, providing in the third section of the Act that, in addition to sentencing hearings held on or after the effective date of the Act, the Act "applies to any resentencing hearings required by law for a defendant who was under the age of 18 years at the time of the offense, was sentenced to life imprisonment without parole prior to the effective date of this act, and for whom a resentencing hearing has been ordered." 2012 N.C. Sess. Laws 148, sec. 3.

Because N.C. Gen. Stat. § 15A-1340.19A *et seq.* does not impose a more severe punishment than that originally mandated in N.C. Gen. Stat. § 14-17, but instead provides sentencing guidelines that comply with the United States Supreme Court's decision in *Miller* and allows the trial court discretion to impose a lesser punishment based on applicable mitigating factors, defendant could not be disadvantaged by the application of N.C. Gen. Stat. § 15A-1340.19A *et seq.* Thus, there is no violation of the constitutional prohibitions on *ex post facto* laws.

2. Presumption

[2] Defendant next argues N.C. Gen. Stat. § 15A-1340.19A *et seq.* violates the constitutional guarantees against cruel and unusual punishment. *See* U.S. Const. Amend. 8; N.C. Const. art. I, § 27. Specifically, defendant contends N.C. Gen. Stat. § 15A-1340.19A *et seq.* presumptively favors a sentence of life without parole for juveniles convicted of first-degree murder and, therefore, the risk of disproportionate punishment under N.C. Gen. Stat. § 15A-1340.19A *et seq.* is as great as it was when N.C. Gen. Stat. § 14-17 mandated a sentence of life without parole for juveniles convicted of first-degree murder.

Defendant relies on the language in N.C. Gen. Stat. § 15A-1340.19A *et seq.* to support his argument that there is a presumption in favor of life without parole. Specifically, defendant points to N.C. Gen. Stat. § 15A-1340.19C(a), which provides, "[t]he court shall consider any *mitigating factors* in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole *instead of* life imprisonment without parole." N.C. Gen. Stat. § 15A-1340.19C(a) (emphasis added). Defendant contends that the inclusion of only "mitigating factors" and the use of "instead of" demonstrates there is a presumption in favor of life without parole.

We first note that the use of "instead of," considered alone, does not show there is a presumption in favor of life without parole. Even the definitions of "instead of" quoted by defendant, *see Duer v. Hoover & Bracken Energies, Inc.* 753 P.2d 395, 398 (Okla. Ct. App. 1986) ("as a substitute for or alternative to"); The American Heritage Dictionary of the English Language, 909 (5th ed. 2011) ("[i]n place of something previously mentioned"), seem to indicate that "instead of" is merely used to distinguish between sentencing options. This is consistent with N.C. Gen. Stat. § 15A-1340.19B(a)(2), which states, "the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in [N.C. Gen. Stat. §] 14-17, *or* a lesser sentence of life imprisonment with parole." N.C. Gen. Stat. § 15A-1340.19B(a)(2) (emphasis added).

Yet, the reason for the General Assembly's use of "instead of" in N.C. Gen. Stat. § 15A-1340.19C(a), as opposed to "or," becomes clear when considered in light of the fact that the sentencing guidelines require the court to consider only mitigating factors. Because the statutes only provide for mitigation from life without parole to life with parole and not the other way around, it seems the General Assembly has designated life without parole as the default sentence, or the starting point for the court's sentencing analysis. Thus, to the extent that starting the sentencing analysis with life without parole creates a presumption, we agree with defendant there is a presumption.

We decline, however, to hold that presumption is unconstitutional and we do not think N.C. Gen. Stat. § 15A-1340.19A *et seq.* "turns *Miller* on its head by making life without parole sentences the norm, rather than the exception[,]" as defendant asserts. In *Miller*, the Court made clear that it was not holding sentences of life without parole for juveniles unconstitutional. *See* 567 U.S. at __, 183 L. Ed. 2d at 424 ("Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.") The Court's holding in *Miller* simply requires "that sentencing courts consider a child's 'diminished culpability and heightened capacity for change' before condemning him or her to die in prison." *Montgomery v. Louisiana*, __ U.S. __, __, 193 L. Ed. 2d 599, 610-11 (2016) (quoting *Miller*, 567 U.S. at __, 183 L. Ed. 2d at 424). A review of N.C. Gen. Stat. § 15A-1340.19A *et seq.* reveals the sentencing guidelines do just that. Instead of imposing a mandatory sentence of life without parole, the sentencing guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq.* require the sentencing court to hold a sentencing hearing during

which the defendant may submit mitigating circumstances, including the defendant's "youth (and all that accompanies it)[,]" *Miller*, 576 U.S. at __, 183 L. Ed. 2d at 424, which the trial court must consider in determining whether to sentence defendant to life without parole or life with parole. As noted in our discussion of defendant's first issue, these sentencing guidelines seem to comply precisely with the requirements of *Miller*.

Moreover, given that N.C. Gen. Stat. § 15A-1340.19A *et seq.* was enacted in response to *Miller* to allow the youth of a defendant and its attendant characteristics to be considered in determining whether a lesser sentence than life without parole is warranted, it seems commonsense that the sentencing guidelines would begin with life without parole, the sentence provided for adults in N.C. Gen. Stat. § 14-17 that the new guidelines were designed to deviate from. *See* N.C. Gen. Stat. § 15A-1340.19B(a)(2) (referring to "life imprisonment without parole, as set forth in [N.C. Gen. Stat. §] 14-17[]"). This commonsense approach is supported by repeated references to mitigation in *Miller* and the cases it relies on. For example, the Court in *Miller* refers to the "mitigating qualities of youth," 567 U.S. at __, 183 L. Ed. 2d at 422, and explains that "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." 567 U.S. at __, 183 L. Ed. 2d at 430.

While the Court did indicate in *Miller* that it thought "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon[,]" the Court explained that its belief was based on "all [it had] said in *Roper*, *Graham*, and [*Miller*] about children's diminished culpability and heightened capacity for change[]" and "the great difficulty [it] noted in *Roper* and *Graham* of distinguishing at [an] early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' " 576 U.S. at __, 183 L. Ed. 2d at 424 (quoting *Roper*, 543 U.S. at 573, 161 L. Ed. 2d 1; *Graham*, 560 U.S. at 68, 176 L. Ed. 2d 825). Explaining that *Miller* announced a substantive rule of constitutional law, the Court has since stated that although *Miller* "did not bar a punishment for all juvenile offenders, as the Court did in *Roper* or *Graham*[,] *Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, __ U.S. at __, 193 L. Ed. 2d at 620.

Upon review, nothing in N.C. Gen. Stat. § 15A-1340.19A *et seq.* conflicts with the Court's belief that sentences of life without parole for juvenile defendants will be uncommon or the substantive rule of law.

N.C. Gen. Stat. § 15A-1340.19C(a) requires the sentencing court to take mitigating factors into consideration. With proper application of the sentencing guidelines in light of *Miller*, it may very well be the uncommon case that a juvenile is sentenced to life without parole under N.C. Gen. Stat. § 15A-1340.19A *et seq.*

For these reasons, we hold it is not inappropriate, much less unconstitutional, for the sentencing analysis in N.C. Gen. Stat. § 15A-1340.19A *et seq.* to begin with a sentence of life without parole and require the sentencing court to consider mitigating factors to determine whether the circumstances are such that a juvenile offender should be sentenced to life with parole instead of life without parole. Life without parole as the starting point in the analysis does not guarantee it will be the norm.

3. Due Process

[3] In his last constitutional challenge, defendant argues N.C. Gen. Stat. § 15A-1340.19A *et seq.* deprives him of the right to due process of law, *see* U.S. Const. Amend. 14; N.C. Const. art. I, § 19, because the law is unconstitutionally vague and will lead to arbitrary sentencing decisions for juvenile offenders.

In *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998), our Supreme Court explained that "[i]t is an essential element of due process of law that statutes contain sufficiently definite criteria to govern a court's exercise of discretion." 348 N.C. at 596, 502 S.E.2d at 823. In construing whether a statute contains sufficient criteria, the Court begins with the presumption that the statute is constitutional. *Id.* at 596, 502 S.E.2d at 824. The court then strictly construes the statute in a manner that allows the intent of the legislature to control. *Id.* Intent of the legislature may be determined by the circumstances surrounding enactment of the statute. *Id.*

> Under a challenge for vagueness, the [United States] Supreme Court has held that a statute is unconstitutionally vague if it either: (1) fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"; or (2) fails to "provide explicit standards for those who apply [the law]."

Id. at 597, 502 S.E.2d at 824 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 227 (1972)). The North Carolina standard is nearly identical. *Id.* (citing *In re Burrus*, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969) ("When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries

sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met."))

As in *Green*, defendant only challenges the second prong of the vagueness standard, the "guidance" component, in this case. Defendant does not challenge the vagueness standard's first prong, the "notice" requirement.

Specifically, defendant contrasts the sentencing guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq.* with those for capital sentencing, N.C. Gen. Stat. § 15A-2000, and structured sentencing, N.C. Gen. Stat. § 15A-1340.16, in that the sentencing guidelines do not provide for the consideration of aggravating factors. Because the sentencing guidelines do not provide a process to weigh aggravating and mitigating factors, defendant contends the sentencing guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq.* "fail[] to provide any process by which a court can identify the few children who warrant life in prison without parole." We disagree.

A review of sentencing guidelines is important. N.C. Gen. Stat. § 15A-1340.19B sets forth the procedure for sentencing a defendant who was a juvenile at the time they committed first-degree murder. As previously quoted, it first requires that if defendant is not convicted of first-degree murder solely on the basis of the felony murder rule, "the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in [N.C. Gen. Stat. §] 14-17, or a lesser sentence of life imprisonment with parole." N.C. Gen. Stat. § 15A-1340.19B(a)(2). Subsection (b) then provides for the consideration of evidence at the sentencing hearing. Subsection (b) does not require evidence presented during the guilt determination phase of the trial to be resubmitted, but provides that "[e]vidence, including evidence in rebuttal, may be presented as to any matter that the court deems relevant to sentencing, and any evidence which the court deems to have probative value may be received." N.C. Gen. Stat. § 15A-1340.19B(b). That evidence includes evidence of mitigating factors. Specifically, subsection (c) provides that a defendant "may submit mitigating circumstances to the court[.]" N.C. Gen. Stat. § 15A-1340.19B(c). Those mitigating circumstances may include, but are not limited to, the following: "(1) Age at the time of the offense[;] (2) Immaturity[;] (3) Ability to appreciate the risks and consequences of the conduct[;] (4) Intellectual capacity[;] (5) Prior record[;] (6) Mental health[;] (7) Familial or peer pressure exerted upon the defendant[; and] (8) Likelihood that the defendant would benefit from rehabilitation in confinement." *Id.* The list also includes, "(9) Any other mitigating factor

or circumstance." *Id.* Both the State and the defendant are "permitted to present argument for or against the sentence of life imprisonment with parole." N.C. Gen. Stat. § 15A-1340.19B(d). In conjunction with N.C. Gen. Stat. § 15A-1340.19B, N.C. Gen. Stat. § 15A-1340.19C requires "[t]he court [to] consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole." N.C. Gen. Stat. § 15A-1340.19C(a).

Upon review of these sentencing guidelines, we reiterate what we have noted in our discussion of the first two issues on appeal – the guidelines comply precisely with the requirements in *Miller*. The sentencing guidelines require a sentencing hearing at which a defendant may present mitigating factors related to youth and its attendant characteristics which, in turn, the sentencing court must consider before imposing a sentence of life without parole. Although N.C. Gen. Stat. § 15A-1340.19C(a) simply directs the court to "consider" mitigating factors, when viewed in light of the circumstances surrounding enactment, that is through the lens of *Miller*, we hold N.C. Gen. Stat. § 15A-1340.19A *et seq.* is not unconstitutionally vague and will not lead to arbitrary sentencing decisions. The discretion of the sentencing court is guided by *Miller* and the mitigating factors provided in N.C. Gen. Stat. § 15A-1340.19B(c).

We also note that in addressing a comparison between the discretion afforded in N.C. Gen. Stat. § 15A-1340.19A *et seq.* and capital punishment sentencing similar to defendant's comparison in this case, in *State v. Lovette*, __ N.C. App. __, 758 S.E.2d 399 (2014) ("*Lovette II*"), this Court stated that "our capital sentencing statutes have no application[.]" __ N.C. App. at __, 758 S.E.2d at 406. This Court further explained that "[a]lthough there is some common constitutional ground between adult capital sentencing and sentencing a juvenile to life imprisonment without parole, these similarities do not mean the United States Supreme Court has directed or even encouraged the states to treat cases such as this under an adult capital sentencing scheme." *Id.*

Defendant also argues N.C. Gen. Stat. § 15A-1340.19A *et seq.* violates his right to trial by jury. In support of his arguments, defendant again compares N.C. Gen. Stat. § 15A-1340.19A *et seq.* to capital sentencing and structured sentencing, which require a jury to determine the existence of aggravating factors. *See State v. Everette*, 361 N.C. 646, 650, 652 S.E.2d 241, 244 (2007) ("[I]n most instances, aggravating factors increasing a defendant's sentence must be submitted to a jury and

proved beyond a reasonable doubt.") (citing *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004)). However, as defendant asserts in his void for vagueness argument, N.C. Gen. Stat. § 15A-1340.19A *et seq.* does not require the finding of aggravating factors. The sentencing guidelines only require the sentencing court to consider the mitigating circumstances of defendant's youth to determine whether a lesser punishment of life without parole is appropriate. Thus, no jury determination was required and defendant's argument is without merit.

4. Findings of Fact

[4] In the first non-constitutional issue raised on appeal, defendant contends the trial court failed to make adequate findings of fact to support its decision to impose a sentence of life without parole. We agree.

N.C. Gen. Stat. § 15A-1340.19C provides that "[t]he order adjudging the sentence shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order." N.C. Gen. Stat. § 15A-1340.19C(a). In *State v. Antone*, __ N.C. App. __, 770 S.E.2d 128 (2015), this Court noted that " 'use of the language "shall" is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error.' " __ N.C. App. at __, 770 S.E.2d at 130 (quoting *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001)). This Court then reversed the trial court's decision in *Antone* to sentence the juvenile offender to life without parole, holding the trial court's one-page sentencing order did not contain sufficient findings of fact to meet the mandate in N.C. Gen. Stat. § 15A-1340A.19C(a). *Id.* at __, 770 S.E.2d at 130. This Court explained as follows:

> The trial court's order makes cursory, but adequate findings as to the mitigating circumstances set forth in N.C. Gen. Stat. § 15A-1340.19B(c)(1), (4), (5), and (6). The order does not address factors (2), (3), (7), or (8). In the determination of whether the sentence of life imprisonment should be with or without parole, factor (8), the likelihood of whether a defendant would benefit from rehabilitation in confinement, is a significant factor.
>
> We also note that portions of the findings of fact are more recitations of testimony, rather than evidentiary or ultimate findings of fact. The better practice is for the trial court to make evidentiary findings of fact that resolve any conflicts in the evidence, and then to make ultimate findings of fact that apply the evidentiary findings to the

> relevant mitigating factors as set forth in N.C. Gen. Stat. § 15A-1340.19B(c). If there is no evidence presented as to a particular mitigating factor, then the order should so state, and note that as a result, that factor was not considered.

Id. at __, 770 S.E.2d at 130-31 (internal citations omitted).

The present case is easily distinguishable from *Antone* in that the trial court's order spans ten pages and includes thirty-four findings of fact. Yet, despite acknowledging that the resentencing order "describes in great detail trial facts as to the offense and evidence elicited at the resentencing hearing[,]" defendant still contends the findings are insufficient. Defendant asserts that "[n]owhere in the order did the resentencing court indicate which evidence demonstrated 'the absence or presence of any mitigating factors.' " We agree.

As the defendant acknowledges, the trial court did issue many findings concerning both the circumstances of the offense and the circumstances of defendant. Many of those findings go to factors identified as mitigating factors in N.C. Gen. Stat. § 15A-1340.19B(c), such as age, upbringing, living environment, prior incidents, and intelligence. But, it is unclear from the order whether many of the findings are mitigating or not. For example, and as pointed out by defendant, the trial court found in finding number twenty-three, "[d]efendant was once a member of the 'Bloods' gang and wore a self-made tattoo of a 'B' on his arm." Yet that finding further provided, "[a]s of October, 2005 [defendant] was no longer affiliated with the gang. He had been referred to the Charlotte Mecklenburg Police Department 'Gang of One' program that worked with former gang members." This finding could be interpreted different ways – defendant was capable of rehabilitation or rehabilitative efforts had failed. Similarly, the trial court found in finding of fact number nine that "[a]t the time of the crime [defendant] was 16 years, 9 months old." While the finding makes clear that defendant was a juvenile, it is unclear whether defendant's age is mitigating or not. In finding of fact number twenty-six, the trial court found that "individuals around the age of 16 can typically engage in cognitive behavior which requires thinking through things and reasoning, but not necessarily self-control." In that same finding, however, the trial court also found, "[t]hings that may affect an individual's psycho-social development may be environment, basic needs, adult supervision, stressful and toxic environment, peer pressure, group behavior, violence, neglect, and physical and/or sexual abuse." The trial court's other findings show that defendant has experienced many of those things found by the trial court to affect development.

Instead of identifying which findings it considered mitigating and which were not, after making its findings, the trial court summarized its considerations in finding of fact thirty-four as follows:

> The Court, has considered the age of the Defendant at the time of the murder, his level of maturity or immaturity, his ability to appreciate the risks and consequences of his conduct, his intellectual capacity, his one prior record of juvenile misconduct (which this Court discounts and does not consider to be pivotal against the Defendant, but only helpful as to the light the juvenile investigation sheds upon Defendant's unstable home environment), his mental health, any family or peer pressure exerted upon defendant, the likelihood that he would benefit from rehabilitation in confinement, the evidence offered by Defendant's witnesses as to brain development in juveniles and adolescents, and all of the probative evidence offered by both parties as well as the record in this case. The Court has considered Defendant's statements to the police and his contention that it was his co-defendant . . . who planned and directed the commission of the crimes against [the victim], the Court does note that in some of the details and contentions the statement is self-serving and contradicted by physical evidence in the case. In the exercise of its informed discretion, the Court determines that based upon all the circumstances of the offense and the particular circumstances of the Defendant that the mitigating factors found above, taken either individually or collectively, are insufficient to warrant imposition of a sentence of less than life without parole.

This finding in no way demonstrates the "absence or presence of any mitigating factors." It simply lists the trial court's considerations and final determination. We hold this finding insufficient and require the trial court to identify which considerations are mitigating and which are not.

Additionally, other considerations listed by the trial court are not supported by findings. "[A] finding of 'irreparable corruption' is not required," *Lovette II*, __ N.C. App. at __, 758 S.E.2d at 408, but "the likelihood of whether a defendant would benefit from rehabilitation in confinement[] is a significant factor." *Antone*, __ N.C. App. at __, 770 S.E.2d at 130. In finding of fact thirty-four, the trial court indicated that it took into consideration "the likelihood that [defendant] would benefit from rehabilitation in confinement." Yet, there is no finding of fact concerning

the likelihood of rehabilitation. In fact, in finding of fact number twenty-seven, the trial court found that the clinical psychologist "was unable to say with any certainty that . . . [defendant] would or would not reoffend."

While the order was extensive in detailing the evidence, it did not "include findings on the absence or presence of any mitigating factors" as mandated in N.C. Gen. Stat. § 15A-1340.19C(a).

5. Abuse of Discretion

[5] In the last issue on appeal, defendant argues the trial court abused its discretion in resentencing him to life without parole under N.C. Gen. Stat. § 15A-1340.19A *et seq.* In support of his argument, defendant distinguishes the circumstances in his case from those considered in *Lovette II*, in which this Court determined the trial court did not err in sentencing a juvenile offender to life without parole. __ N.C. App. at __, 758 S.E.2d at 410.

As this Court stated in *Lovette II*, "[t]he findings of fact must support the trial court's conclusion that defendant should be sentenced to life imprisonment without parole[.]" *Id.* at __, 758 S.E.2d at 408. "The trial judge may be reversed for abuse of discretion only upon a showing that his ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Westall*, 116 N.C. App. 534, 551, 449 S.E.2d 24, 34 (1994). Having just held the trial court did not issue adequate findings of fact, we must hold the trial court abused its discretion in sentencing defendant to life without parole. This holding, however, expresses no opinion on whether such sentence may be appropriate on remand; it is based solely on the trial court's consideration of inadequate findings as to the presence or absence of mitigating factors to support its determination.

III. Conclusion

For the reasons discussed, we affirm the constitutionality of N.C. Gen. Stat. § 15A-1340.19A *et seq.* However, the trial court did not issue sufficient findings of fact on the absence or presence of mitigate factors as required by N.C. Gen. Stat. § 15A-1340.19C(a). As a result, it is difficult for this Court to review the trial court's determination that life without parole was appropriate in this case and we must reverse and remand to the trial court for further sentencing proceedings.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER LEE SINGLETARY

No. COA15-1125

Filed 3 May 2016

1. Witnesses—State's expert—compensation—cross-examination

In defendant's trial for multiple sexual offenses committed against a child, the trial court erred by not allowing defendant to inquire into an expert witness's compensation during cross-examination. The error, however, was not prejudicial, because testimony regarding the source of the witness's compensation was heard by the jury, the payments were disclosed in defendant's criminal file, and there was overwhelming evidence of defendant's guilt.

2. Witnesses—interested—jury instructions

In defendant's trial for multiple sexual offenses committed against a child, the trial court did not err by declining to give defendant's requested pattern jury instruction on the testimony of an interested witness. The trial court's jury instruction was sufficient to address defendant's concern, leaving no doubt that it was the jury's duty to determine whether the witness was interested or biased.

3. Sentencing—statutory sentencing provision—aggravated sentencing—no notice—finding by trial court—constitutionality

On appeal from defendant's trial for multiple sexual offenses committed against a child, in which he received an aggravated sentence pursuant to N.C.G.S. § 14-27.4A(c), the Court of Appeals held that N.C.G.S. § 14-27.4A(c) (subsequently codified at N.C.G.S. § 14-27.28(c)) was facially unconstitutional. Pursuant to that sentencing provision, defendant was given no advance notice of the State's intent to seek any aggravating factors, and the "egregious aggravation" factors were found solely by the trial court rather than by the jury beyond a reasonable doubt. Because the error was not harmless, the case was remanded for a new sentencing hearing.

Appeal by defendant from judgment entered 27 April 2015 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 31 March 2016.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

TYSON, Judge.

Christopher Lee Singletary ("Defendant") appeals from judgment entered after a jury found him guilty of sexual offense of a child by a substitute parent, indecent liberties with a child, and two counts of sexual offense with a child; adult offender. We find no prejudicial error in Defendant's trial.

The trial court followed the sentencing procedures prescribed by N.C. Gen. Stat. § 14-27.4A(c), now codified at N.C. Gen. Stat. § 14-27.28(c), in sentencing Defendant. Those procedures do not require prior notice to Defendant of the State's or the trial court's intent to seek or impose aggravating factors, do not require aggravating factors to be submitted to a jury, and do not require the State to prove the aggravating factors beyond a reasonable doubt. Those procedures contravene well-settled commands of the Supreme Court of the United States, and for that reason are not constitutionally valid. Because application of N.C. Gen. Stat. § 14-27.4A(c) to Defendant's case did not result in harmless error, we vacate the trial court's judgment, and remand for a new sentencing hearing.

I. Background

J.K., a male child, lived with his mother, Ashley, in an apartment complex in Greensboro, North Carolina. Ashley met Defendant while she was working as a dancer at a nightclub. The two began dating, and Defendant moved in with Ashley and J.K. approximately two months later. Defendant lived with J.K. and Ashley from when J.K. was three years old until he was seven years old.

Shortly after this living arrangement began, Defendant and J.K. "immediately bonded" and J.K. began affectionately referring to Defendant as "Daddy Chris." At trial, J.K. testified to multiple instances of sexual abuse committed by Defendant against him, beginning when J.K. was four years old.

J.K. testified Defendant had, on multiple occasions, hurt his "bottom." J.K. explained Defendant had done so by putting his penis "inside [J.K.'s] . . . bottom." J.K. also testified Defendant had forced him to perform fellatio on him on at least one, and possibly two, occasions. During and after these incidents, Defendant told J.K. that performing these acts would "make him [J.K.] stronger."

J.K. described two specific instances of anal sex perpetrated by Defendant, both of which occurred on 25 August 2013. The first instance occurred at a movie theatre. J.K. testified Defendant took him into the bathroom at the theatre and performed anal sex on him inside a bathroom stall. The second instance occurred later that night. While Ashley was taking a shower, Defendant ordered J.K. onto the couch, took down J.K.'s and his own pants, and again performed anal sex.

The following day, J.K. attended his first day of school in the first grade. That night, J.K. had difficulty having a bowel movement. Ashley asked J.K. whether he was constipated and if his stomach was bothering him. After initially being reluctant to provide an explanation to his mother, J.K. eventually stated "it's Chris," and revealed the sexual abuse Defendant had committed against him.

After J.K. reported the sexual abuse to Ashley, she dialed 911. Paramedics arrived, and took J.K. to Moses H. Cone Memorial Hospital, where he was examined by Lindsay Strickland ("Nurse Strickland"), a sexual assault nurse examiner. At trial, Nurse Strickland was accepted, without objection, as an expert in sexual assault nurse examination. During the course of Nurse Strickland's examination of J.K., he repeated his allegations of Defendant's sexual acts and abuse.

Nurse Strickland's physical examination revealed two tears in J.K.'s anus. Nurse Strickland took photographs of J.K.'s injuries and collected his underwear as evidence. Nurse Strickland testified the anal tears were caused by "some type of blunt force trauma," and that it is "not a normal finding to have those tears or injuries."

The underwear collected from J.K. by Nurse Strickland was examined by Lora Ghobrial ("Ghobrial"), a serologist in the forensic biology section of the North Carolina State Crime Laboratory. After being accepted, without objection, as an expert in serology, Ghobrial testified the underwear collected from J.K. was negative for semen, but her examination revealed a single sperm. The sperm was found in the rectal area on the inside of J.K.'s underwear.

J.K. was also examined by Dr. Stacey Wood Briggs ("Dr. Briggs"), a pediatric physician. Dr. Briggs testified that, given J.K.'s age and stage of development, it was "extremely, extremely unlikely to the point of absurdity that [J.K.] could produce sperm." Dr. Briggs testified that less than one percent of eleven year old boys – who would have been five years older than J.K. at the time the sperm was recovered – are able to produce sperm. Dr. Briggs opined the sperm found on the inside of J.K.'s underwear originated from a male other than J.K.

1. Guilt-Innocence Phase

Defendant's trial began on 14 April 2015. In addition to the testimony of J.K, Ashley, Nurse Strickland, Ghobrial, and Dr. Briggs, the State proffered the testimony of Jessica Spence ("Spence"), a licensed professional counselor. Spence was accepted, without objection, as an expert in the field of counseling, and testified to her interactions with and treatment of J.K.

On cross-examination, the following colloquy occurred between Spence and Defendant's counsel regarding Spence's compensation:

> [Defendant's counsel]: Is [J.K.] a private client or has he been assigned by some sort of court service or something?
>
> [Spence]: He came to my office through his mother. . . . We use victim's compensation to pay for [J.K.'s] visits, if that's what you're asking.
>
> . . . .
>
> [Defendant's counsel]: So neither [J.K.] nor his mother are responsible for paying your fees?
>
> [Spence]: Yes, that's correct.
>
> [Defendant's counsel]: And what -- by just -- what is your fee?
>
> [Prosecutor]: Objection, relevance.
>
> THE COURT: Sustained. Counsel, approach.

A bench conference was held, after which questioning continued on other topics.

The record reveals $2,200 was paid to Spence from a fund administered by the North Carolina Crime Victim's Compensation Commission, a state agency. *See* N.C. Gen. Stat. § 15B-3. Pursuant to state law, a record of these payments was filed with the trial court and included in Defendant's file. *See* N.C. Gen. Stat. § 15B-15 (2015). The jury was never made aware of the amount of these payments.

At the close of all evidence, a charge conference was held. At the conference, Defendant requested North Carolina Criminal Pattern Jury Instruction 104.20, testimony of an interested witness. Defendant argued that Spence "is clearly an interested witness." The court denied Defendant's request. The jury returned verdicts of guilty and convicted Defendant of all charges.

2. Sentencing Phase

Following the jury verdicts, a sentencing hearing was held. The court determined Defendant was a prior record level II for sentencing purposes. The State explained to the court that the offense of "sexual offense with a child; adult offender" codified at N.C. Gen. Stat. § 14-27.4A is a "special offense that goes off of the grid, our normal sentencing grid" and provides that a defendant convicted of the offense shall in no case receive a sentence of less than 300 months pursuant to subsection (b). The State then asserted subsection (c) "gives the court an option of going from that 25 years [300 months] all the way up to life imprisonment without parole."

The court appeared perplexed by its range of sentencing options under the statute:

> THE COURT: Well, if the court is inclined to go above [a 300 month sentence], but is less than life or -- is there any number between what -- is there -- I'm just looking for guidance on how the court can calculate or if it's 300 minimum or life or --

The State again asserted the sentence must be a minimum of 300 months, and the court could, in its discretion, sentence Defendant to any sentence up to and including life in prison without parole, but "does have to make specific findings."

Regarding sentencing, Defendant's counsel "start[ed] by talking about what [he] [thought] the constitutional law require[d] the court to do in this case." Defendant's counsel discussed several cases from the Supreme Court of the United States, and argued "for [the court] to be allowed constitutionally to go above the 25 year [300 month] minimum, the state is required to allege aggravating factors in the indictment, present those aggravating factors to the jury, and have the jury determine whether or not those aggravating factors apply to the case."

After hearing from the Defendant and the State, the trial court imposed two consecutive sentences of 420 to 504 months imprisonment, one for each conviction pursuant to N.C. Gen. Stat. § 14-27.4A. The court stated it believed it "ha[d] the authority under the statute to sentence above the minimum, and finds that as a matter of fact, in support of sentencing above the minimum, that this crime was of such a brutality and severity and scope and degree that it warrants a sentence above the minimum." The court then made several oral findings of fact supporting its decision. The court also sentenced Defendant for the other crimes

for which he was convicted, and ordered those sentences to run concurrently. Defendant gave notice of appeal in open court.

After imposing sentence, the court went "back on the record" later the same day. Defendant was not present. The trial judge stated he had "neglected to include the additional 60 months." He further stated "because that's a change in the maximum number based on the numbers in the statute," the court declined to allow Defendant to be present, and instead "rel[ied] on defense counsel to explain that to [D]efendant."

Ten days later, another sentencing hearing was held. Defendant was present at this hearing. Defendant's counsel reiterated his objection to a sentence above the 300 month minimum, based on several United States and North Carolina Supreme Court opinions. Defendant's counsel again argued the court could not sentence Defendant to more than 300 months. The State responded by arguing N.C. Gen. Stat. § 14-27.4A "gives the court the authority to find its own egregious factors." The State admitted it was aware of the case law Defendant had presented and cited, but argued "we still have a statute here that the court has correctly followed" and "[t]his law is not going to be changed unless it is appealed."

After hearing from the State and Defendant, the court sentenced Defendant for a third time, finding it had "jurisdiction to resentence the defendant because the sentence imposed in the presence of the defendant on the record was inconsistent with the law." On the convictions under N.C. Gen. Stat. § 14-27.4A(c), the court sentenced Defendant to two consecutive terms of 420 months to 564 months imprisonment, "reflecting the court's original intention." Defendant again gave notice of appeal in open court.

II. Issues

Defendant argues the trial court erred by: (1) preventing Defendant from conducting cross-examination into the compensation paid to the State's expert witness; and (2) denying Defendant's request for a jury instruction on testimony of an interested witness. Defendant also challenges the constitutional validity of N.C. Gen. Stat. § 14-27.4A(c), and argues the statute allows the trial court to find "egregious aggravation" factors to increase punishment without submitting the issue to a jury, in violation of the Sixth Amendment to the Constitution of the United States. Even if the statute is upheld as constitutional, Defendant further argues the "egregious aggravation" factors found by the trial court in this case do not comport with the evidence at trial.

III. Cross-Examination Regarding Expert Witness Compensation

[1] Defendant argues the trial court manifestly abused its discretion in preventing him from making any inquiry into the compensation paid to the State's expert witness.

A. Standard of Review

When a defendant "seeks to establish on appeal that the exercise of [the trial court's] discretion is reversible error, he must show harmful prejudice as well as clear abuse of discretion" *State v. Goode*, 300 N.C. 726, 730, 268 S.E.2d 82, 84 (1980). In order to demonstrate prejudicial error, the defendant must show " 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Lanier*, 165 N.C. App. 337, 354, 598 S.E.2d 596, 607 (2004) (quoting N.C. Gen. Stat. § 15A-1443(a)).

B. Analysis

North Carolina "adheres to the 'wide-open' rule of cross-examination, so called because the scope of inquiry is not confined to those matters testified to on direct examination." *State v. Penley*, 277 N.C. 704, 708, 178 S.E.2d 490, 492 (1971) (citation omitted). Pursuant to the North Carolina Rules of Evidence, "[a] witness may be cross-examined on *any matter relevant to any issue* in the case, *including credibility*." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2015) (emphasis supplied).

Our Supreme Court "has consistently held that an expert witness' compensation is a permissible cross-examination subject to test partiality towards the party by whom the expert was called." *State v. Cummings*, 352 N.C. 600, 620, 536 S.E.2d 36, 51 (2000) (citations and internal quotation marks omitted); *State v. Brown*, 335 N.C. 477, 493, 439 S.E.2d 589, 598-99 (1994); *see also State v. Allen*, 322 N.C. 176, 195, 367 S.E.2d 626, 636 (1988); *State v. Creech*, 229 N.C. 662, 671, 51 S.E.2d 348, 355 (1949).

Given these clear and repeated pronouncements by our Supreme Court, and the record evidence indicating Spence's fee was paid with funds originating from a state agency, we hold the trial court erred in sustaining the State's objection to Defendant's questioning regarding Spence's fee. The source and amount of a fee paid to an expert witness is a permissible topic for cross-examination, as it allows the opposing party to probe the witnesses' partiality, if any, towards the party by whom the expert was called. *E.g.*, *Cummings*, 352 N.C. at 620, 536 S.E.2d at 51.

Any partiality established by cross-examination goes directly to the witnesses' credibility and is properly for the jury to weigh and consider. *See*, *e.g.*, *id.*

We express no opinion on whether Spence was, in fact, a witness interested in the outcome or partial to the State. Pursuant to *Creech* and its progeny, however, the general topic and question asked was proper for cross-examination to allow Defendant to test Spence's partiality, if any, towards the State or against Defendant. *E.g.*, *Cummings*, 352 N.C. at 620, 536 S.E.2d at 51; *Creech*, 229 N.C. at 671, 51 S.E.2d at 355. An expert witness receiving compensation through a state-run victim's compensation fund does not *per se* make a witness interested in the outcome of the case nor demonstrate partiality to the State.

This holding of error does not end our analysis. We must determine if the trial court's error resulted in "harmful prejudice" to Defendant. *Goode*, 300 N.C. at 730, 268 S.E.2d at 84. We hold it did not.

Notwithstanding the trial court's error in not allowing Defendant an opportunity to inquire into any possible bias presented by Spence's fee arrangement, Defendant was able to elicit on cross-examination that the source of the Spence's fee was neither J.K. nor his mother, but rather a "victim's compensation" fund was the source "to pay for [J.K.'s] visits." The record before us also reflects that a record of the amount of these payments was filed with the trial court and included in Defendant's criminal file, pursuant to N.C. Gen. Stat. § 15B-15.

In addition, and under the "harmful prejudice" analysis, the State presented other overwhelming evidence of Defendant's guilt to which Defendant did not object. The State presented the testimony of, among others: (1) J.K., presenting his allegations of Defendant's acts; (2) J.K.'s mother, Ashley, corroborating key parts of J.K.'s account; (3) Nurse Strickland, regarding her examination of J.K. and her physical findings of two tears in J.K.'s anus; (4) Ghobrial, establishing that a single sperm was found in the rectal area of the inside of J.K.'s underwear; and (5) Dr. Briggs, who testified that the possibility the sperm came from J.K. was "extremely, extremely unlikely to the point of absurdity" due to his age.

In light of the unobjected testimony elicited by Defendant regarding the source of Spence's fee, the information contained in Defendant's file regarding the source of Spence's payment, and the other overwhelming evidence of Defendant's guilt, we hold Defendant has failed to carry his burden of proving "a reasonable possibility that, had the error in question not been committed, a different result would have been reached."

Lanier, 165 N.C. App. at 354, 598 S.E.2d at 607 (citation omitted); *see also State v. Thaggard*, 168 N.C. App. 263, 278-79, 608 S.E.2d 774, 784-85 (2005) (finding no prejudicial error in erroneously admitted evidence when the State "presented a wealth of testimonial and physical evidence implicating defendant as the perpetrator of the crimes" for which he was convicted). Defendant's argument is overruled.

IV. Jury Instruction on Interested Witness

[2] Defendant argues the trial court erred in denying his request for a jury instruction on the testimony of an interested witness. We disagree.

A. Standard of Review

"We review a trial court's denial of a request for jury instructions *de novo*." *State v. Ramseur*, 226 N.C. App. 363, 373, 739 S.E.2d 599, 606 (2013) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations and internal quotation marks omitted).

B. Analysis

"[A]n instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate feature of the case[.]" *State v. Dale*, 343 N.C. 71, 77-78, 468 S.E.2d 39, 43 (1996) (citation and quotation marks omitted). On appeal, "[t]he burden is on the party assigning error to show that the jury was misled or that the verdict was affected by an omitted instruction." *State v. Peoples*, 167 N.C. App. 63, 69, 604 S.E.2d 321, 326 (2004) (citations and quotations omitted). The charge is sufficient "if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed." *Id.* (citation and internal quotation marks omitted).

Defendant's counsel requested the trial court give N.C.P.I.-Crim. 104.20, an instruction on interested witnesses. The pattern jury instruction states:

> You may find that a witness is interested in the outcome of this trial. You may take the witness's interest into account in deciding whether to believe the witness. If you believe the testimony of the witness in whole or in part, you should treat what you believe the same as any other believable evidence.

N.C.P.I.-Crim. 104.20 (2015). The trial court denied Defendant's request.

However, the trial court gave the following instruction:

> You are the sole judge of the believability of witnesses. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, any part, or none of a witness' testimony. In deciding whether to believe a witness, you should use the same tests of truthfulness that you use in your everyday lives.
>
> Among other things, those tests may include the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, the manner and appearance of the witness, *any interest*, *bias*, *prejudice or partiality the witness may have*, the apparent understanding and fairness of the witness, whether the testimony is reasonable and whether the testimony is consistent with other believable evidence in the case.

(emphasis supplied).

The trial court's jury charge was sufficient to address Defendant's concerns, as it left no doubt that it was the jury's duty to determine whether the witness was interested or biased. *See Peoples*, 167 N.C. App. at 69, 604 S.E.2d at 326. We hold Defendant has failed to meet his burden of showing "the jury was misled or that the verdict was affected by an omitted instruction." *Id.* Defendant's argument is without merit and overruled.

V. N.C. Gen. Stat. § 14-27.4A

[3] Defendant argues the trial court violated his Sixth Amendment right to a trial by jury when the court sentenced him to an "egregiously aggravated" sentence without prior notice of the State's intent to seek, or the court's intent to find and impose, aggravating factors without their submission to the jury to find their existence beyond a reasonable doubt. The State concedes the error and reasons that, due to this concession, this Court need not address the constitutional validity of N.C. Gen. Stat § 14-27.4A(c).

As explained below, the State's concession does not weaken, and, in fact, strengthens, Defendant's contention that the constitutional question must be considered. After three attempts, each over the objection of Defendant's counsel who cited controlling authority, the trial court, with the State's encouragement, followed the exact procedure mandated by the statute in applying its provisions and sentencing Defendant.

N.C. Gen. Stat § 14-27.4A does not expressly require, nor contemplate, aggravating factors to be submitted to the jury or proven beyond a reasonable doubt. Rather, the statute leaves the determination of "egregious aggravation" to "the court" under some undefined burden of proof. N.C. Gen. Stat. § 14-27.4A(c). Since the trial court followed the prescribed statutory procedure, we must examine whether the statute comports with federal constitutional requirements.

A. Standard of Review

It is "well settled in this State that the Courts have the power, and it is their duty in proper cases, to declare an act . . . unconstitutional -- but it must be plainly and clearly the case." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 519 S.E.2d 888, 892 (1961). This Court has the power to review the facial validity of criminal statutes. *See* N.C. Gen. Stat. §§ 1-267.1(a1),(d) (2015) (noting that while a "facial challenge to the validity of an act of the General Assembly shall be transferred" and heard by a three judge panel in Wake County Superior Court, the procedure "applies only to civil proceedings[, and n]othing in this section shall be deemed to apply to criminal proceedings"). "When assessing a challenge to the constitutionality of legislation, this Court's duty is to determine whether the General Assembly has complied with the constitution." *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 283 (2015).

"When examining the constitutional propriety of legislation, we presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality." *State v. Mello*, 200 N.C. App. 561, 564, 684 S.E.2d 477, 479 (2009) (citation and internal quotation marks omitted), *aff'd per curiam*, 364 N.C. 421, 700 S.E.2d 224 (2010). If a statute contains both constitutional and unconstitutional provisions, we sever the unconstitutional provisions and uphold the constitutional provisions to the extent possible. *Fulton Corp. v. Faulkner*, 345 N.C. 419, 422, 481 S.E.2d 8, 10 (1997) (citations omitted).

This Court reviews the asserted unconstitutionality of a statute *de novo*. *State v. Whitaker*, 201 N.C. App. 190, 192, 689 S.E.2d 395, 396 (2009), *aff'd*, 364 N.C. 404, 700 S.E.2d 215 (2010).

B. Analysis

1. Sentencing Pursuant to the Structured Sentencing Act

Criminal sentencing in North Carolina is conducted pursuant to Article 81B of Chapter 15A of the North Carolina General Statutes, known as the "Structured Sentencing Act." The Structured Sentencing Act consists of

> a grid. . . with a vertical axis reflecting the seriousness of the crime and the horizontal axis reflecting the extent of the offender's prior criminal record. Each cell in the grid, corresponding to a particular "class" of felony or misdemeanor and a particular prior record "level," contains information about the available sentence dispositions. . . . The cell also contains information about the durations of the prison terms the judge could select, including a presumptive range, a higher aggravated range, and a lower mitigated range.

Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. Rev. 1935, 1951 (2006) (footnotes omitted).

Violation of N.C. Gen. Stat. § 14-27.4A is a Class B1 felony. N.C. Gen. Stat. § 14-27.4A (2014). Pursuant to the sentencing grid contained in the Structured Sentencing Act, the possible active minimum sentence ranges for a prior record level II offender, such as Defendant, convicted of a Class B1 felony are as follows: 166-221 months in the mitigated range; 221-276 months in the presumptive range; and 276-345 months in the aggravated range. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2015). Under the Structured Sentencing Act, the highest presumptive minimum sentence set forth for a prior record level II offender convicted of a Class B1 felony is 276 months imprisonment. *See id.* This high-end presumptive minimum sentence corresponds to a maximum presumptive sentence of 392 months imprisonment. *See* N.C. Gen. Stat. § 15A-1340.17(f) (providing that the maximum sentence "for a Class B1 . . . felony that is subject to the registration requirements of G.S. Chapter 14, Article 27A," such as N.C. Gen. Stat. § 14-27.4A, *see* N.C. Gen. Stat. § 14-208.6(5) (2013), "shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus 60 additional months"); *see also State v. Ruffin*, 232 N.C. App. 652, 655-56, 754 S.E.2d 685, 687-88 (2014).

Under the Structured Sentencing Act, a sentencing judge may only depart from the presumptive range and sentence a defendant within the aggravated range, if the State has proven to a jury, beyond a reasonable doubt, that factors in aggravation exist. N.C. Gen. Stat. § 15A-1340.16(a)-(a1); *accord State v. Norris*, 360 N.C. 507, 512, 630 S.E.2d 915, 919 (2006). The State must also provide a defendant with at least 30 days prior written notice of its intent to seek and prove one or more aggravating factors, and must "list all of the aggravating factors the State seeks to establish." N.C. Gen. Stat. § 15A-1340.16(a6).

N.C. Gen. Stat. § 14-27.4A, now codified in identical form at N.C. Gen. Stat. § 14-27.28, departs from this normal sentencing procedure in two ways, the latter of which Defendant challenges in this case. This opinion will cite to the former codification of the statute, in force at the time Defendant was sentenced.

2. Sentencing Pursuant to N.C. Gen. Stat § 14-27.4A

N.C. Gen. Stat. § 14-27.4A first departs from the Structured Sentencing Act by providing that a defendant convicted of "sexual offense with a child; adult offender" "shall be sentenced pursuant to [the Structured Sentencing Act], *except* that in no case shall the person receive an active punishment of less than 300 months[.]" N.C. Gen. Stat. § 14-27.4A(b) (emphasis supplied). Under this provision, the structured sentencing scheme involving mitigated, presumptive, and aggravated minimum sentencing ranges, along with the corresponding maximum sentences, remain in place, *except* to require a minimum sentence of 300 months. N.C. Gen. Stat. §§ 14-27.4A(b); 15A-1340.17(c), (e), (f).

As previously noted, without aggravating factors admitted or proven to a jury, a prior record level II offender convicted of a Class B1 offense is generally sentenced within the presumptive range to a minimum sentence between 221 and 276 months imprisonment. *See* N.C. Gen. Stat. § 15A-1340.17(c). The possible minimum sentences prescribed in the presumptive range, as well as the mitigated range and the lower end of the aggravated range, for a Class B1 felony are less than the minimum 300 month sentence commanded by N.C. Gen. Stat. § 14-27.4A(b). N.C. Gen. Stat. § 14-27.4(b) (providing a defendant convicted under the statute is sentenced consistent with the Structured Sentencing Act, but "in no case shall . . . receive" a sentence of less than 300 months).

Due to subsection (b)'s deviation from the Structured Sentencing Act, a prior record level II offender convicted under this statute and sentenced in the presumptive range would be sentenced to a minimum of 300 months imprisonment. *Id.* Defendant has not challenged subsection (b)'s departure from the normal minimum sentence set forth in the Structured Sentencing Act, and we must presume it to be constitutional in the case before us. *See*, *e.g.*, *Lowery v. Bd. Of Graded Sch. Trs.*, 140 N.C. 33, 40, 52 S.E. 267, 269 (1905) ("In determining the constitutionality of an act of the Legislature courts always presume, in the first place, that the act is constitutional.").

N.C. Gen. Stat. § 14-27.4A further departs from the Structured Sentencing Act, under subsection (c), in a second and more substantial

manner. Defendant challenges the constitutionality of N.C. Gen. Stat. § 14-27.4A(c), which provides:

> Notwithstanding the provisions of Article 81B of Chapter 15A of the General Statutes, [the Structured Sentencing Act,] the court may sentence the defendant to active punishment for a term of months greater than that authorized pursuant to G.S. 15A-1340.17, up to and including life imprisonment without parole, if the court finds that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17. If the court sentences the defendant pursuant to this subsection, it shall make findings of fact supporting its decision, to include matters it considered as egregious aggravation. Egregious aggravation can include further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover. Egregious aggravation may also be considered based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.

N.C. Gen. Stat. § 14-27.4A(c) (2013).

The State argues it conceded Defendant must be re-sentenced and, because of its concession, we need not address the constitutional validity of N.C. Gen. Stat. § 14-27.4A(c). This meretricious argument fails because, despite constitutional challenges by Defendant with citation to controlling legal authority and acknowledgement of such authority by the State, the trial court followed all procedures required by N.C. Gen. Stat. § 14-27.4A(c) in sentencing Defendant. The trial court determined, and stated in open court, that the crime "was of such a brutality and severity and scope and degree that it warrants a sentence above the minimum." The trial court then entered eight findings of fact "[i]n support of sentencing pursuant to § 14-27.4A(c)," and entered a judgment sentencing Defendant to more than 300 months, as required by N.C. Gen. Stat. § 14-27.4A(b), but less than the death penalty, as permitted by N.C. Gen. Stat. § 14-27.4A(c).

In a reversal from its position in the trial court, the State now concedes the trial court erred by failing to give prior notice of its intent to find "egregious aggravation" factors, failing to submit aggravating factors to the jury, and failing to have the factors proven beyond a reasonable doubt. The State's concession, however, does not change the fact that the statute does not require a defendant to be provided advance notice of "egregious aggravation" factors, does not require aggravating factors to be submitted to the jury, and does not require the factors to be proven to a jury beyond a reasonable doubt before subsection (c) may be utilized to impose an "egregiously aggravated" sentence. *Id.*

If this Court were to accept the State's logic, each time N.C. Gen. Stat. § 14-27.4A(c) is invoked and administered in the *exact* manner permitted by the statute to lengthen the term of a defendant's sentence, this Court would be required to remand the case for a new sentencing hearing without inquiry into the statute's constitutional validity. If the trial court, on remand, again utilized the power conferred upon it by subsection (c) to lengthen the defendant's sentence, and again did so in the *exact* manner permitted by the statute, the State would have this Court again remand without inquiry into the statute's constitutional validity. This process would continue, presumably, until the trial court employed some set of procedures not required nor contemplated under the challenged statute in order to satisfy constitutional requirements.

By its own terms, and as conceded by the State, N.C. Gen. Stat. § 14-27.4A(c) does not require prior notice to Defendant, submission of "egregious aggravation" factors to the jury, or proof beyond a reasonable doubt by the State. The trial court did not err by failing to submit aggravating factors to the jury, because N.C. Gen. Stat. § 14-27.4A(c) does not require, or permit, such a submission. The trial court, after three attempts, followed all procedures mandated by the statute to sentence Defendant in the manner it did. The State's explicit concession of error as an attempt to avoid addressing the constitutional validity of N.C. Gen. Stat. § 14-27.4A(c) does not resolve the inherent and unavoidable defects contained in the statute and applied to Defendant in this case.

3. Constitutional Validity of N.C. Gen. Stat. § 14-27.4A(c)

Statutes which permit a defendant's sentence to be lengthened based on the existence of aggravating factors have a long history of review at the Supreme Court of the United States, beginning with *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000).

In *Apprendi*, the Supreme Court considered a New Jersey statute, which allowed for an "extended term" of imprisonment for a defendant

convicted of a firearm possession law, if the trial judge, by a preponderance of the evidence, found the defendant committed the crime for the purpose of intimidating an "individual or group of individuals because of" their membership in an enumerated protected class. 530 U.S. at 468-69, 147 L. Ed. 2d at 442. The Court struck down the statute, and held:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse [this] statement of the rule[:] . . . "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Id. at 490, 147 L. Ed. 2d at 455 (citation omitted). The Court held the New Jersey statute was unconstitutional because it allowed a judge, rather than a jury, to find the factors which lead to an "extended term" of imprisonment, and the judge was permitted to find and impose those factors by only a preponderance of the evidence. *Id.* at 491-92, 147 L. Ed. 2d at 456.

Four years later, the Supreme Court expanded upon its holding in *Apprendi* in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). In *Blakely*, the Court considered a Washington kidnapping statute, which allowed the trial court to impose a 120-month sentence, despite a usual 53-month maximum. 542 U.S. at 298, 159 L. Ed. 2d at 410. The statute permitted the lengthened prison term based upon a judicial determination that the defendant had acted with "deliberate cruelty." *Id.* Under Washington's statute, a judge imposing an "exceptional sentence" was required to make findings of fact and conclusions of law to support the sentence. *Id.* at 299, 159 L. Ed. 2d at 411.

The Court noted that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* *Id.* at 303, 159 L. Ed. 2d at 413 (emphasis original) (citation omitted). "In other words," the Court continued, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04, 159 L. Ed. 2d at 413-14 (emphasis in original).

The Court explained that if the sentencing judge imposed the "exceptional sentence" without finding additional facts, "he would have been reversed." *Id.* at 304, 159 L. Ed. 2d at 414. "Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial." *Id.* at 305-06, 159 L. Ed. 2d at 415. *Apprendi* "carries out this design by ensuring that the judge's authority to sentence *derives wholly from the jury's verdict*. Without that restriction, the jury would not exercise the control that the Framers intended." *Id.* at 306, 159 L. Ed. 2d at 415 (emphasis supplied). The Court held the Washington statute violated the Sixth Amendment, as applicable to the states through the Fourteenth Amendment of the Constitution of the United States. *Id.*; *see also Parker v. Gladden*, 385 U.S. 363, 364, 17 L. Ed. 2d 420, 422 (1966). Against this backdrop of controlling constitutional requirements, we consider N.C. Gen. Stat. § 14-27.4A(c).

In this case: (1) Defendant was not given any advance notice of the State's intention to seek any aggravating factors; (2) Defendant did not admit to any aggravating factors; (3) no aggravating factors were presented to the jury under any standard of proof; and (4) no aggravation or "egregious aggravation" factors were proven beyond a reasonable doubt. Under *Apprendi* and *Blakely*, the minimum sentence permitted for this offense is the 300-month minimum mandated by N.C. Gen. Stat. § 14-27.4A(b), and the maximum sentence permitted by law without finding additional facts was the 392-month statutory maximum sentence permitted by N.C. Gen. Stat. § 15A-1340.17(f). N.C. Gen. Stat. § 15A-1340.17(f); *see also Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413. The constitutional validity of subsection (b) has not been challenged in this case.

N.C. Gen. Stat. § 14-27.4A(c) purports to provide the trial court with the unfettered ability to lengthen a defendant's sentence up to and including life imprisonment without the possibility of parole, with no advance notice to the defendant and with no input from a jury. To wield this unbridled power, the statute only requires the trial court to: (1) find "that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope" beyond normally committed in such crimes; and (2) make findings of fact supporting its decision, "to include matters it considered as egregious aggravation." N.C. Gen. Stat. § 14-27.4A(c).

The judge's purported authority to sentence a defendant to a sentence above the statutory maximum does not "derive[] wholly from the jury's verdict." *Blakely*, 542 U.S. at 305-06, 159 L. Ed. 2d at 415. Instead,

the judge's authority over a defendant's sentence derives from his or her perceptions of the circumstances and severity of the crime, and a subjective judicial consideration of factors he or she considers to be "egregious aggravation."

Following the enactment of N.C. Gen. Stat. § 14-27.4A by our General Assembly in 2008, legal commentators opined that subsection (c) was likely unconstitutional. *See* Jessica Smith, North Carolina Crimes: A Guidebook on the Elements of Crime 236-37 (7th ed. 2012) ("[T]his procedure [permitted by N.C. Gen. Stat. § 14-27.4A(c)] appears to run afoul of the United States Supreme Court decision in *Blakely v. Washington*[.]"); John Rubin, 2008 Legislation Affecting Criminal Law and Procedure," UNC School of Gov't Administration of Justice Bulletin No. 2008/006, 3-4 (2008), *available at* http://www.sogpubs.unc.edu/ electronicversions/ pdfs/aojb0806.pdf (noting the procedure proscribed by N.C. Gen. Stat. § 14-27.4A(c) "is likely unconstitutional" and the definition of egregious aggravation was "designed for application by judges exercising discretion, not for juries normally charged with finding concrete facts.").

"Because circumstances in aggravation are found by the judge, not the jury," and because the statute does not require any aggravation or "egregious aggravation" factors be found beyond a reasonable doubt, N.C. Gen. Stat. § 14-27.4A(c) "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " *Cunningham v. California*, 549 U.S. 270, 288-89, 166 L. Ed. 2d 856, 873 (2007) (quoting *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d 435).

4. Use of Special Verdicts

Devoting but a single sentence of its brief to the defense of N.C. Gen. Stat. § 14-27.4A(c)'s constitutionality, the State argues the trial court may properly submit "egregious aggravation" factors to a jury through the use of a special verdict. Based upon the clear statutory text and the inherently judicial nature of the inquiry required by the statute, we reject the State's contention.

N.C. Gen. Stat. § 14-27.4A(c) explicitly gives only "the court," and not the jury, the ability to determine whether the nature of the offense and the harm inflicted require a sentence in excess of what is otherwise permitted by law. N.C. Gen. Stat. § 14-27.4A(c) ("*[T]he court* may sentence the defendant . . . *if the court* finds that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in

basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17. *If the court* sentences the defendant pursuant to this subsection, *it* shall make findings of fact supporting *its* decision, to include matters *it* considered as egregious aggravation." (emphasis supplied)).

The primary purpose of statutory construction is to "give effect to the intent of the legislature." *State v. Oliver*, 343 N.C. 202, 212, 470 S.E.2d 16, 22 (1996) (citation omitted). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted); *see also State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967) ("It is elementary that in the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise." (citation omitted)). Courts are "without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong, N.C. Index 2d, Statutes § 5 (1968)).

In order for this Court to read the statute to permit a jury to determine that "the nature of the offense and the harm inflicted" requires a lengthened sentence, or to determine "egregious aggravation" under the statute, we must on multiple occasions interpret the term "the court" in the statutory text as "the jury." Such an extratextual interpretation would then require the jury: (1) to determine which circumstances are found in the "heartland of cases" of the crime of sexual offense with a child; adult offender; and (2) to determine whether the circumstances in the present case fall within, or outside, of that "heartland." N.C. Gen. Stat. § 14-27.4A(c).

Not only would the State's proposed textual substitution require the jury to undertake an inherently judicial function – such as compiling a list of prior cases, considering the facts and circumstances of those cases, and determining whether the facts and circumstances of the present case are more "egregious" than what is present in the "heartland" of child sexual abuse cases – it is also contrary to the clear statutory mandate that all such actions be conducted by "the court." N.C. Gen. Stat. § 14-27.4A(c).

Applying the "clear and unambiguous" text of N.C. Gen. Stat. § 14-27.4A(c), the General Assembly intended the findings of fact and "egregious aggravation" factors to be found by "the court," and not to be

submitted to the jury through the use of a special verdict. We decline, as we must, to "interpolate, or superimpose" provisions onto the statute in order to save its constitutionality. *Camp*, 286 N.C. at 152, 209 S.E.2d at 756 (citation omitted). The State's contention is overruled.

Courts reviewing the constitutional validity of a statute normally "neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478, 130 L. Ed. 2d 964, (1995). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987). Because both the statutory text and the inherently judicial nature of the tasks required of the trial court under N.C. Gen. Stat. § 14-27.4A(c) do not allow for submission of aggravation or "egregious aggravation" factors to the jury to be found beyond a reasonable doubt, and because such submission is a federal constitutional requirement, no set of circumstances exist under which N.C. Gen. Stat. § 14-27.4A(c) is valid. *Id.*

As written, N.C. Gen. Stat. § 14-27.4A(c) impermissibly provides the trial court with unfettered discretion to lengthen a defendant's sentence, up to and including a sentence of life in prison without parole. The judge's ability to sentence a defendant above the 392 month maximum set out in N.C. Gen. Stat. §§ 15A-1340.17(f) does not "derive[] wholly from the jury's verdict," but rather derives wholly from a solely judicial determination of whether "egregious aggravation" exists. This determination is made without prior notice to a defendant, and without submission to and a finding by a jury of proof beyond a reasonable doubt. *Blakely*, 542 U.S. at 305-06, 159 L. Ed. 2d at 415.

The procedures prescribed by N.C. Gen. Stat. § 14-27.4A(c) do not comport with the minimum constitutional requirements set forth in *Apprendi*, *Blakely*, *Cunningham*, and the Sixth Amendment to the Constitution of the United States, as made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Parker*, 385 U.S. at 364, 17 L. Ed. 2d at 422.

5. Harmless Error Review

Following the Supreme Court of the United States' decision in *Blakely*, our Supreme Court treated sentencing errors under *Blakely* as structural errors and reversible *per se*. *See State v. Allen*, 359 N.C. 425, 444, 615 S.E.2d 256, 269 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899

(2006). However, the Supreme Court of the United States subsequently decided *Washington v. Recuenco*, 548 U.S. 212, 165 L. Ed. 2d 466 (2006), which held that "[f]ailure to submit a sentencing factor to the jury . . . is not structural error." *Id.* at 222, 165 L. Ed. 2d at 477.

In response to the decision in *Recuenco*, our Supreme Court held in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), consistent with *Recuenco*, that failure to submit a sentencing factor to the jury is subject to harmless error review. *Id.* at 42, 638 S.E.2d at 453. In conducting harmless error review, "we must determine from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* at 50, 638 S.E.2d at 458 (quoting *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999)). A defendant "may not avoid a conclusion that evidence of an aggravating factor is 'uncontroverted' by merely raising an objection at trial . . . Instead, the defendant must 'bring forth facts contesting the omitted element,' and must have 'raised evidence sufficient to support a contrary finding.' " *Id.* (quoting *Needer*, 527 U.S. at 19, 144 L. Ed. 2d at 53).

As discussed, Defendant was afforded no prior notice of the State's intent to seek any aggravation factors, much less "egregious aggravation" factors, as required under the normal sentencing procedures set forth in the Structured Sentencing Act. N.C. Gen. Stat. §§ 15A-1340.16(a), (a1), (a6). Rather, consistent with N.C. Gen. Stat. § 14-27.4A(c), the trial court simply found the aggravating factors at sentencing.

Defendant had no prior notice or opportunity to "bring forth facts" to contest the facts found by the trial court to support its sentence under subsection (c). *Blackwell*, 361 N.C. at 50, 638 S.E.2d at 458 (citation omitted). Presuming those omissions alone were harmless, we must consider whether the evidence supporting the "egregious aggravation" factors found by the trial court were "so 'overwhelming' and 'uncontroverted' that any rational jury, as fact-finder, would have found the disputed aggravating factors beyond a reasonable doubt." *Id.* (citation omitted).

N.C. Gen. Stat. § 14-27.4A(c) requires the trial court to determine whether aggravating factors exist, and also requires the trial court to determine whether the aggravating factors are "egregious aggravation" factors: that they are "of such brutality, duration, severity, degree, or *scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes*[.]" N.C. Gen. Stat. § 14-27.4A(c)

(emphasis supplied). We do not minimize the severe harm and probable long-term impacts of Defendant's multiple criminal acts upon J.K.. These acts speak for themselves and the jury found Defendant guilty of committing these crimes.

On the record and evidence before us, though, we cannot say the evidence supporting the egregious aggravation factors was "so 'overwhelming' and 'uncontroverted' " such that any rational jury unanimously would have not only found the aggravating factors to exist, but would have also found the circumstances were "of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes." *Id.* The inherently judicial nature of the tasks the statute requires the court to undertake in sentencing a defendant pursuant to N.C. Gen. Stat. § 14-27.4A(c) renders any harmless error analysis particularly inapposite.

The State has also failed to show, and we cannot find, the circumstances presented in this case went so far outside the statutorily required "heartland of cases" such that any reasonable trier of fact would have, or could have, found them to be present beyond a reasonable doubt. As noted *supra*, such an exercise – identifying and scrutinizing past "sexual offense of a child; adult offender" cases, determining what "normally" occurs in those cases, comparing what "normally" occurs to what actually occurred in the present case, and deciding whether the circumstances of the present case fall within or outside of the "heartland of cases" – is an inherently judicial function.

The statute does not require, and Defendant did not receive, any prior notice of the "egregious aggravation" factors ultimately found by the judge at Defendant's sentencing hearing. The statute also did not require the State to prove "egregious aggravation" factors beyond a reasonable doubt to the jury. Due to these deficiencies in Defendant's sentence, we hold the *Apprendi* and *Blakely* errors created by the trial court's adherence to N.C. Gen. Stat. § 14-27.4A(c) were not harmless.

VI. Conclusion

The trial court erred in not allowing Defendant to further inquire into the amount of Spence's compensation during cross-examination. However, due to the testimony regarding the source of Spence's compensation that was heard by the jury, the disclosure of payments from the victim's compensation fund into Defendant's criminal file pursuant to N.C. Gen. Stat. § 15B-15, and other overwhelming evidence of Defendant's guilt, Defendant has failed to show "a reasonable possibility that, had the

error in question not been committed, a different result would have been reached." *Lanier*, 165 N.C. App. at 354, 598 S.E.2d at 607.

The trial court did not err in declining to give the requested pattern jury instruction on testimony of an interested witness. The trial court provided the requested instruction on interest or bias "in substance" through the use of an alternate instruction. Defendant has failed to show "the jury was misled" by the instruction given, "or that the verdict was affected by an omitted instruction." *Peoples*, 167 N.C. App. at 69, 604 S.E.2d at 326.

Defendant's counsel presented the trial court with the controlling case law prior to sentencing. On the court's third attempt, Defendant was sentenced to between 56 and 344 months of additional incarceration beyond the consecutive 784-month sentence the law allowed for the two Class B1 felonies for which he was found guilty, on the basis of "egregious aggravation" factors found solely by a judge.

"The Framers would not have thought it too much to demand that, before depriving a man of [56 to 344 more months] of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State." *Blakely*, 542 U.S. at 313-14, 159 L. Ed. 2d at 420 (citation omitted).

N.C. Gen. Stat. § 14-27.4A(c), now codified at N.C. Gen. Stat. § 14-27.28(c), provides no prior notice to Defendant that "egregious aggravation" factors will be used to enhance his presumptive sentence, does not require the requisite levels of proof or a finding of "egregious aggravation" beyond a reasonable doubt, and does not provide any mechanism for submission of "egregious aggravation" factors to a jury. The statute explicitly and exclusively vests "the court" with both the ability and the duty to find "egregious aggravation" and to sentence a defendant to any term of imprisonment longer than 300 months, up to and including life in prison without the possibility of parole.

As Defendant has not challenged N.C. Gen. Stat. § 14-27.4A(b), we express no opinion on its constitutional validity. That subsection purports to allow the court to impose a minimum sentence of 300 months imprisonment, clearly within the aggravated range for minimum sentence under the generally applicable Structured Sentencing Act, without any of the notice or other protections normally provided thereunder.

As written, N.C. Gen. Stat. § 14-27.4A(c) violates a defendant's rights under the Sixth Amendment, as interpreted by the Supreme Court of

the United States in *Apprendi*, *Blakely*, and *Cunningham*. These cases unmistakably hold that aggravating factors, other than a defendant's prior record level or his admission, which "increase[] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Cunningham*, 549 U.S. at 288-89, 166 L. Ed. 2d at 873; *Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413; *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455.

We hold that Defendant has failed to demonstrate prejudicial error in his trial. As for sentencing, the trial court followed the sentencing procedures prescribed by N.C. Gen. Stat. § 14-27.4A(c), now codified at N.C. Gen. Stat. § 14-27.28(c), in sentencing Defendant. However, those procedures are in clear violation of *Apprendi*, *Blakely*, and *Cunningham*. The constitutional violations did not, beyond all reasonable doubt, result in harmless error to Defendant. The trial court's sentence and judgment are vacated, and this case is remanded for a new sentencing hearing.

NO PREJUDICIAL ERROR AT TRIAL; JUDGMENT VACATED; REMANDED FOR NEW SENTENCING HEARING.

Chief Judge McGEE and Judge INMAN concur.

STATE OF NORTH CAROLINA
v.
JULIE WATKINS

No. COA15-1221

Filed 3 May 2016

Child Abuse, Dependency, and Neglect—misdemeanor child abuse—sufficiency of evidence

The State's evidence was adequate to submit misdemeanor child abuse charges to the jury, and the trial court properly denied defendant's motions to dismiss, where the child was under two years old and was left alone in a vehicle for over six minutes, with a window rolled more than halfway down in 18-degree weather with sleet, snow, and wind.

Appeal by defendant from judgment entered by Judge J. Thomas Davis in Madison County Superior Court. Heard in the Court of Appeals 9 March 2016.

Roy Cooper, Attorney General, by Sharon Patrick-Wilson, Special Deputy Attorney General, for the State.

Allegra Collins Law, by Allegra Collins, for defendant-appellant.

DAVIS, Judge.

Julie Watkins ("Defendant") appeals from her conviction for misdemeanor child abuse. On appeal, she contends that the trial court erred by denying her motions to dismiss. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

The State presented evidence at trial tending to establish the following facts: At approximately 1:30 p.m. on 28 January 2014, Defendant drove with her 19-month-old son, "James,"[1] to the Madison County Sheriff's Office to leave money for Grady Dockery ("Dockery"), an inmate in the jail. The temperature at the time was 18 degrees, and it was windy with accompanying sleet and snow flurries.

After parking her SUV, Defendant left James buckled into his car seat in the backseat of the vehicle and went into the Sheriff's Office. While inside, Defendant got into an argument with employees in the front lobby. Detective John Clark ("Detective Clark") was familiar with Defendant based on prior complaints that had been made about Defendant letting her toddler run loose in the lobby and into adjacent offices while she visited inmates in the jail. Detective Clark entered the lobby and told Defendant that by order of Chief Deputy Michael Garrison she was "not supposed to be on the property and that she needed to leave."

Defendant and Detective Clark argued for "several seconds," and then he escorted her to her vehicle in the parking lot. Defendant was inside the building for at least six-and-a-half minutes. Detective Clark testified that from where Defendant was positioned in the lobby she could not see her vehicle, which was parked approximately 46 feet away from the front door.

When Detective Clark was within 10 feet of Defendant's vehicle, he noticed a small child sitting alone in the backseat. Defendant acknowledged that the child was hers. Detective Clark observed that the vehicle

1. A pseudonym is used throughout this opinion to protect the identity of the minor child.

was not running and that the driver's side rear window was rolled more than halfway down. He testified that it was "very, very cold and windy and the snow was blowing." He stated that snow was blowing onto his head, making him "so cold I wanted to get back inside." He noticed that the child, who appeared to be sleeping, had a scarf around his neck. Before walking back into the building, Detective Clark told Defendant to turn on the vehicle and "get some heat on that child."

Defendant was charged with misdemeanor child abuse later that day. She was found guilty of that offense in Madison County District Court on 12 September 2014. She appealed the conviction to Madison County Superior Court for a trial *de novo*, and a jury trial was held on 7 May 2015 before the Honorable J. Thomas Davis. The only witness offered by the State was Detective Clark. At the close of the State's evidence, Defendant moved to dismiss the charge against her based on insufficiency of the evidence, and the trial court denied the motion.

Defendant elected to testify on her own behalf. She stated that throughout the events occurring on 28 January 2014 James was wearing a snowsuit along with mittens, boots, a toboggan, pants, and a sweater. Before going to the Sheriff's Office that afternoon, Defendant drove to a nearby grocery store. She met her father there, and he waited inside her vehicle with James (who was sleeping) while she went into the store for approximately fifteen minutes. The vehicle's engine remained on during this time period, and Defendant described the temperature inside the SUV as "hotter than blazes." Upon Defendant's return to the vehicle, her father left. At that point, she made a last-minute decision to stop at the Sheriff's Office to purchase a calling card for Dockery, who had previously lived with her.

James was still sleeping when they arrived at the Sheriff's Office, so Defendant decided to let him remain in the locked vehicle while she went inside. Based on past experience, she believed it would only take approximately "three or four minutes" to purchase the calling card. Defendant stated that her vehicle's windows were rolled up when she left James asleep in the SUV.

Defendant testified that from where she was standing in the Sheriff's Office she "could look directly into my car and see my kid." She also denied that Detective Clark escorted her out of the building, stating that she left on her own. According to Defendant, Detective Clark followed her outside and screamed at her for two or three minutes, stating at one point: "I'm sick and tired of you coming up here disrespecting my deputies and my staff." Defendant stated that Detective Clark also threatened

to "arrest [her] or serve [her] a warrant" the next time she came to the Sheriff's Office.

At the close of all the evidence, Defendant renewed her motion to dismiss, which was once again denied. The jury found Defendant guilty of misdemeanor child abuse. The trial court sentenced her to 75 days imprisonment, suspended the sentence, and placed her on 12 months supervised probation. Defendant gave oral notice of appeal in open court.

Analysis

The sole issue on appeal is whether the trial court erred in denying Defendant's motions to dismiss. A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). On appeal, this Court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L.Ed.2d 150 (2000).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1,135, 132 L.Ed.2d 818 (1995). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. "The defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (internal citation and quotation marks omitted).

N.C. Gen. Stat. § 14-318.2(a) provides, in pertinent part, that

> [a]ny parent of a child less than 16 years of age . . . who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

N.C. Gen. Stat. § 14-318.2(a) (2015).

The State is required to prove only one of the three distinct acts set forth in N.C. Gen. Stat. § 14-318.2(a). *State v. Fredell*, 283 N.C. 242, 244, 195 S.E.2d 300, 302 (1973). That is, the State must introduce substantial evidence that the parent, by other than accidental means, either (1) inflicted physical injury upon the child; (2) allowed physical injury to be inflicted upon the child; or (3) created or allowed to be created a substantial risk of physical injury. *Id.*

The State does not contend that Defendant or anyone else actually inflicted physical injury upon James. Rather, the only question presented in this appeal is whether the State introduced substantial evidence that Defendant created a substantial risk of physical injury to James.

The phrase "substantial risk of physical injury" is not defined in N.C. Gen. Stat. § 14-318.2. Because of the paucity of cases applying this prong of the statute, Defendant attempts to draw an analogy to cases addressing whether a child was properly adjudicated to be a neglected juvenile under Chapter 7B of the North Carolina General Statutes. She points to several specific cases in which this Court has found parental conduct sufficient to support an adjudication of neglect, arguing that the acts at issue in those cases were more egregious than her conduct here. For example, in *In re D.C.*, 183 N.C. App. 344, 644 S.E.2d 640 (2007), we held that a mother who left her 16-month-old daughter alone in a motel room for at least 30 minutes at 4:00 a.m. exposed the child to an "unacceptable risk of harm . . . ." *Id.* at 353, 644 S.E.2d at 645 (quotation marks omitted). In another case, this Court held that a parent put her child at substantial risk of harm by abusing alcohol and controlled substances in the child's presence and driving while impaired with the child in the vehicle. *In re D.B.J.*, 197 N.C. App. 752, 755-56, 678 S.E.2d 778, 781 (2009).

However, while these cases as well as the other cases cited in Defendant's brief illustrate *some* circumstances that can create a substantial risk of harm to a juvenile, they do not resolve the issue presently before us — that is, whether the State's evidence here was sufficient to raise a jury question regarding a violation of N.C. Gen. Stat. § 14-318.2(a) by Defendant. Here, viewing the evidence, as we must, in the light most favorable to the State with every inference drawn in the State's favor, James, who was under two years old, was left alone and helpless — outside of Defendant's line of sight — for over six minutes inside a vehicle with one of its windows rolled more than halfway down in 18-degree weather with accompanying sleet, snow, and wind. Given the harsh weather conditions, James' young age, and the danger of him being abducted (or of physical harm being inflicted upon him) due to the

window being open more than halfway, we believe a reasonable juror could have found that Defendant "created a substantial risk of physical injury" to him by other than accidental means. *See* N.C. Gen. Stat. § 14-318.2(a).

Defendant acknowledges that her actions "may not have been advisable[] under the circumstances" but argues nevertheless that "this was not a case of child abuse." However, the only question before us in an appeal from the denial of a motion to dismiss is whether a reasonable juror *could* have concluded that the defendant was guilty based on the evidence presented by the State. If so, even if the case is a close one, it must be resolved by the jury. *See State v. Franklin*, 327 N.C. 162, 170, 393 S.E.2d 781, 786-87 (1990) ("Although we concede that this is a close question . . . the State's case was sufficient to take the case to the jury."); *State v. McElrath*, 322 N.C. 1, 10, 366 S.E.2d 442, 447 (1988) (upholding trial court's denial of motion to dismiss even though issue presented was "a very close question").

Because we are satisfied that the State's evidence was adequate to submit the case to the jury, the trial court properly denied Defendant's motions to dismiss. Accordingly, Defendant's argument is overruled.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges ELMORE and HUNTER, JR. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 3 May 2016)

ALFORD v. GREEN No. 15-1101	Granville (13CVS1034)	Affirmed
B & B CRANE SERV., LLC v. DEVERE CONSTR. CO., INC. No. 15-781	Brunswick (14CVS1717)	Affirmed
BIGELOW v. TOWN OF CHAPEL HILL No. 15-897	Orange (11CVS1968)	Affirmed
CAMPBELL v. CITY OF STATESVILLE No. 15-329	Iredell (14CVS1387)	Affirmed
CUMBERLAND CTY. v. CHEEKS No. 15-1127	Cumberland (15CVD2216)	Reversed and Remanded
CURY v. MITCHELL No. 15-1008	Buncombe (08CVS4632)	Affirmed
DILLARD v. VESTER No. 15-1135	Haywood (12CVS1352)	Dismissed
GAY v. PEOPLES BANK No. 15-1103	Lincoln (13CVS383)	Affirmed
GONZALEZ v. TIDY MAIDS, INC. No. 15-1149	N.C. Industrial Commission (X06660)	Affirmed
HARRISON v. GEMMA POWER SYS., LLC No. 15-647	N.C. Industrial Commission (167921)	Affirmed
HENDERSON v. GOODYEAR TIRE & RUBBER CO. No. 15-985	N.C. Industrial Commission (13-737359)	Affirmed in part; reversed and remanded in part
IN RE C.A.G. No. 15-634	New Hanover (10JB46)	Reversed
IN RE C.M. No. 15-1223	Robeson (10JA94)	Reversed and Remanded

IN RE E.R.M.D. No. 15-1131	Rutherford (14JA113)	Affirmed
IN RE F.C.D. No. 15-1178	Sampson (14JA24)	Dismissed
IN RE J.W.M. No. 15-1287	Henderson (14JT51)	Affirmed
IN RE JOYCE No. 15-1318	N.C. Industrial Commission (U00463)	Affirmed in part; dismissed in part
IN RE K.D. No. 15-1365	Columbus (13JA24)	Affirmed
IN RE K.L. No. 15-1130	Robeson (12JT304)	Affirmed
IN RE N.J. No. 15-1241	Johnston (15JA25-26)	Affirmed in Part and Reversed in Part
IN RE OF X.D.G. No. 15-1288	Caldwell (13JA18) (13JA30)	Affirmed
LUECK v. LUECK No. 15-334	Sampson (12CVD1304)	Dismissed and remanded
McNEILL v. McNEILL No. 15-1041	N.C. Industrial Commission (PH-2513) (W61904)	Affirmed
MKTG. AD GRP., LLC v. LATTITUDE 360 GLOBAL, INC. No. 15-911	Iredell (14CVS2554)	Affirmed in Part and Reversed in Part
ROBINSON v. SPIRES No. 15-963	Yancey (14CVS182)	Affirmed
ROCKY MOUNT WEH LP v. LANGSTON No. 15-988	Nash (13CVS714)	Reversed and Remanded
STATE v. BAKER No. 15-600	Forsyth (12CR58255-56)	Reversed, vacated and remanded
STATE v. BASKINS No. 15-1137	Guilford (14CRS88609)	Affirmed

STATE v. BRENNAN No. 15-885	Haywood (14CRS1090) (14CRS51228) (14CRS51230)	Affirmed
STATE v. BROWN No. 15-825	Durham (14CRS51266) (14CRS51267)	No Error
STATE v. CARTER No. 15-1234	Forsyth (13CRS51566)	Vacated and Remanded
STATE v. ENDARA No. 15-864	Mecklenburg (12CRS219167-68) (12CRS219171)	No Error
STATE v. FARABEE No. 15-696	Davidson (12CRS50719) (12CRS665)	NO ERROR in part; VACATED in part
STATE v. GRIFFIN No. 15-492	New Hanover (13CRS54388)	No Error
STATE v. HICKS No. 15-970	Wake (13CRS228746)	No Error
STATE v. HICKS No. 15-1098	Forsyth (13CRS51413)	No Error
STATE v. ISMAEL No. 15-842	Wake (14CRS213010) (14CRS214174)	Vacated and Remanded
STATE v. KETCHUM No. 15-771	Brunswick (14CRS2294-95) (14CRS3296) (14CRS50074) (14CRS50091)	Reversed and Remanded
STATE v. MARTIN No. 15-830	Forsyth (13CRS12383) (13CRS59051)	No Error
STATE v. MARTIN No. 15-986	Forsyth (14CRS51595)	No Error
STATE v. McCOWAN No. 15-948	Wake (13CRS230387)	No Plain Error In Part; No Error In Part

STATE v. McFADDEN No. 15-957	Mecklenburg (13CRS246309)	No Error
STATE v. MELLON No. 15-459	Lincoln (13CRS53174) (13CRS53175)	Vacated and remanded in part; no error in part
STATE v. RODGERS No. 15-1043	Orange (14CRS307)	No Error
STATE v. SHEIKH No. 15-688	Guilford (13CRS100094) (13CRS100098-99) (13CRS100100-102) (14CRS24118) (14CRS24121)	No Error
STATE v. SMITH No. 15-614	Wake (13CRS222682-83)	No Error
STATE v. SMITH No. 15-1220	Mecklenburg (13CRS220191) (13CRS220194) (13CRS220196)	Affirmed
STATE v. VANG No. 15-1069	Catawba (13CRS3475) (13CRS3477) (13CRS54204)	No Error
STATE v. WILKIE No. 15-762	Henderson (12CRS50036)	No Error
TSENG v. MARTIN No. 15-739	Guilford (13CVS7781)	Affirmed

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